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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

PENNZOIL COMPANY,
Petitioner,

v.

DEPARTMENT OF ENERGY, and
JAMES B. EDWARDS, Secretary of Energy,
and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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June 16, 1982

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QUESTIONS PRESENTED FOR REVIEW

1. May the Temporary Emergency Court of Appeals disregard the analytical standard of *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), and accord "special" deference to an administrative interpretation which was not contemporaneous with the issuance of the underlying regulations, was in conflict with the original intent of those regulations, was inconsistent with both earlier constructions and later pronouncements by the agency, and was, by the agency's own admission and actions, neither validly reasoned nor thoroughly considered.

2. May the Temporary Emergency Court of Appeals uphold summary judgment in the face of disputed factual issues material to its decision by resolving those issues in the first instance on appeal in favor of the party prevailing on summary judgment below.

PARTIES TO THE PROCEEDING

All parties before the Temporary Emergency Court of Appeals are identified in the caption of the case.*

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* The following are the non-wholly owned affiliates of Petitioner Pennzoil Company: National Transit Company; Pennesco, Inc.; and Eureka Pipe Line Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Pennzoil Company (Pennzoil) hereby petitions for a writ of certiorari to review the decision of the Temporary Emergency Court of Appeals of the United States in this case.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals is unreported to date and a copy is appended. (App. A, *infra*). The opinion of the district court (App. B, *infra*) is reported at 514 F. Supp. 516 (D. Del. 1981).

JURISDICTION

The judgment and opinion of the Temporary Emergency Court of Appeals was entered on April 6, 1982.[1] The court issued an order on May 17, 1982, denying rehearing with suggestion of rehearing *en banc* (App. C, *infra*). This

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[1] No formal judgment, separate from its opinion, was issued by the court of appeals.

Court has jurisdiction under 28 U.S.C. § 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note.

STATUTES AND REGULATIONS INVOLVED

This case arises from a federal administrative agency's actions in administering regulations governing the pricing of crude oil by producers. The regulations, which established a two-tier crude oil price structure, were promulgated by the Cost of Living Council (CLC) pursuant to the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, as part of Phase IV of the Economic Stabilization Program, and were originally codified at 6 C.F.R. § 150.353 *et seq.*, 38 Fed. Reg. 22536 (Aug. 22, 1973). Pursuant to Section 4(a) of the Emergency Petroleum Allocation Act of 1973 (EPAA), as amended, 15 U.S.C. § 753(a), the then Federal Energy Office (FEO) republished and recodified the CLC petroleum regulations, without substantive change, as the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 211 and 212 (39 Fed. Reg. 1924, Jan. 15, 1974). The regulation relevant here was then codified at 10 C.F.R. § 212.72 and is set forth in App. E, *infra*.[2]

STATEMENT OF THE CASE

1. As originally promulgated by the Cost of Living Council in August, 1973, the two-tier crude oil price regulations had dual objectives: to limit inflationary crude oil price increases and, simultaneously, to provide incentives for intensified domestic production so as to reduce the level

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[2] Although revoked for price control purposes, *see* Executive Order 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981), the producer pricing regulations, including 10 C.F.R. § 212.72, have been continued in effect by congressional direction for purposes of the Crude Oil Windfall Profit Tax Act of 1980. I.R.C. § 4996(b)(8)(D).

of imported crude oil. *See Tenneco Oil Co.* v. *FEA*, 613 F.2d 298, 299 (TECA 1979). To achieve these objectives, the price control system employed a 1972 base period to establish the historical production level for producing properties and imposed a regulated ceiling price only on crude oil production at or below that level. Producers were thus required in August, 1973, to determine properties that produced crude oil in 1972 for the purpose of calculating base period production. The regulations defined "property" as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." [3] Each "property" was assigned a "base production control level" (BPCL) determined for each month in 1972 by its crude oil production and sales for that year. *Id.*, App. 67a. Under the regulations, production in excess of the BPCL qualified for sale as "new" oil.[4] A producer was required to "certify" each property and its BPCL to its purchaser for each sale of "new" oil produced from the property. 10 C.F.R. § 212.74 (c).

No explanation of the "property" definition accompanied its original promulgation by the CLC. However, in November, 1973 the CLC adopted a new regulation to implement the so-called "stripper well" exemption which contained a parallel "property" definition. In that regulation, the CLC elaborated on the "property" concept, stating that the "property" definition for "stripper well" purposes referred to the right to produce crude oil "in existence in 1972" and was

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[3] 6 C.F.R. § 150.354(b), 38 Fed. Reg. 22538 (Aug. 22, 1973), *recodified at* 10 C.F.R. § 212.72, 39 Fed. Reg. 1924 (Jan. 15, 1974).

[4] App. 67a. During the period relevant to this case, "new" oil could be sold at market prices, and for each barrel of "new" oil produced, a barrel of controlled production could be "released" from the ceiling price rule. 10 C.F.R. §§ 212.73 and .74, 39 Fed. Reg. 1924 (Jan. 15, 1974).

"coextensive with that property used in [§ 212.72] for purposes of determining ['BPCL']".[5] Consequently, as officially construed by the agency, Section 212.72, as well as the parallel "property" definition in the stripper well regulation, required a producer to utilize the property (or "right to produce") "in existence in 1972" to serve as the "property" for pricing purposes.

In this declaratory judgment action, Pennzoil challenges Ruling 1975-15, a putative "interpretative" rule that was published without prior notice or opportunity to comment by Respondent's predecessor, the Federal Energy Administration (FEA).[6] Section II-B of that Ruling announced for the first time new standards for determining a producer's "property" and "base production control level" under § 212.72, which had been adopted a full two years earlier. Specifically, the Ruling declared that a producer could not continue to calculate new oil on the basis of the property in existence in 1972, if the property was later included in a multiple-property unit formed after 1972. Instead, the FEA asserted that for post-1972 multiple-property units, producers were (and had *always* been) required to calculate a new, "unit BPCL" immediately upon unitization and to treat the newly formed unit itself as the "property", even though the underlying regulation did not mention post-1972 unitization, the concept of a "unit BPCL", or include a method for calculating a "unit BPCL".

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[5] 6 C.F.R. § 150.54(s)(2), 38 Fed. Reg. 32494, 32495 (Nov. 26, 1973).

[6] 40 Fed. Reg. 40832 (Sept. 4, 1975), included at App. F, *infra*. FEA succeeded to the functions of the FEO on June 27, 1974 following enactment of the Federal Energy Administration Act, 15 U.S.C. §§ 761-786. In turn, FEA was succeeded by the Department of Energy in 1977 pursuant to the Department of Energy Organization Act, 42 U.S.C. § 7101. Hereafter, Respondents will be collectively referred to as "DOE."

2. At the time the two-tier price system was adopted, Pennzoil was one of numerous producers in the Walker Creek Field in Arkansas. This field consisted of thirty-nine wells, each producing from a 320-acre spacing tract in accordance with the field rules established by the Arkansas Oil and Gas Commission (AOGC). Each of these tracts had produced oil during 1972, and the producers responsible for operating the individual wells had therefore established and certified a BPCL under the regulations for each tract based on its 1972 production. There were, accordingly, thirty-nine regulatory "properties" in the field in August, 1973.

At the time the petroleum pricing regulations were implemented, the individual operators in the field were engaged in discussions regarding the possibility of initiating an enhanced recovery project. After extensive study, the operators had determined that the application of an enhanced recovery technique involving reinjection of natural gas into the producing reservoir could arrest the rapidly declining production in the field and extend its producing life so as to increase by millions of barrels the ultimate recovery of hydrocarbons. However, with more than 140 working interest owners and several thousand royalty owners in the field, unitization was necessary to permit the joint operation of the field required for enhanced recovery operations. A unitization agreement preserves the rights of individual interest owners and insures that production from the enhanced recovery project is equitably shared by all interest owners in the field. See App. 4a, n.3.

By March 8, 1974, over seventy-five percent of the working and royalty interest owners had voluntarily agreed to the proposed unitization. III R. 1003-10.[1] Pennzoil, with a 12½ percent interest, was designated as unit operator. On April 10, 1974, after a public hearing, the AOGC formally

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[1] Citations are to the volume and page number of the nine volume stipulated record filed in the court of appeals.

approved the unitization pursuant to Ark Stat. Ann. § 53-115C-3, and established a May 1, 1974 effective date for the Unit. III R. 1000.

Because the Walker Creek Unit was the first post-1972 multiple-property unit for which Pennzoil had operating responsibility, in April, 1974, Pennzoil sought guidance from FEO officials in Houston, Texas regarding the proper method under the regulations for pricing crude oil from the soon-to-be effective Unit. An FEO representative advised Pennzoil that the individual tracts for which BPCL's had been established should continue to be used as the "properties" following the formation of a new field-wide unit. This issue was later referred to the Legal Subcommittee for the Unit, which was comprised of legal representatives for five operators in the field. This group decided to seek further guidance from the agency's national office. In response to an inquiry from a representative of a member of the Legal Subcommittee in early July, 1974, Mr. James C. Langdon, Jr., then the director of the FEA's Office of Regulatory Review in Washington, confirmed the advice previously received by Pennzoil in Houston. Mr. Langdon stated that in the specific Walker Creek Unit situation the actual production from each tract, treated as a separate "property," should be measured against that property's BPCL. Mr. Langdon explained that the agency ignored the effect of post-1972 unitization on established properties and added that he knew of no imminent agency action to revise the regulations or to issue an interpretation that would alter his construction. III R. 2047-48. This information was communicated to the Legal Subcommittee, together with an explanation that the agency would "put nothing in writing" at that time. III R. 1022.

The Legal Subcommittee considered Mr. Langdon's advice, together with that received from the FEO's Houston

office, and recommended "property-by-property" BPCL's as the appropriate pricing method for unit production. III R. 1022. In addition, Pennzoil's in-house legal counsel, who had previously concluded that maintenance of property-by-property BPCL's appeared permissible under the regulations, reexamined the issue in light of Mr. Langdon's confirmatory advice. He concluded that, since endorsed by agency officials, individual property BPCL's could be utilized for pricing production from the Unit. III R. 1019. Subsequently, a vote of all interest owners approved this procedure. Crude oil produced from the Unit was priced in this manner until the abrupt publication of Ruling 1975-15.

The FEA issued Ruling 1975-15 on August 29, 1975, on the eve of expiration of the agency's statutory authority, as one of a series of Rulings, none of which were preceded by notice and comment procedures.[8] In Ruling 1975-15, the FEA acknowledged that the "property" and "BPCL" regulations *generally required* the producer to look "to the right to produce crude oil *as it existed in 1972 in order to define the property involved.*" App. 71a (emphasis added). In the case of *post-1972 unitization,* however, the agency deviated from this principle and declared that the newly created unit was itself to be treated as the "property" instead of the individual properties or "rights to produce crude oil" as they "existed in 1972." The agency stated that producers were required to calculate an entirely new unit BPCL to supplant the established BPCL's in the field on the effective date of unitization. App. 72a. This "interpretation" retroactively

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[8] *See* Rulings 1975-9 through 1975-16, 40 Fed. Reg. 40826-40834 (Sept. 4, 1975). Evidence in the record suggests that the timing factor was a consideration in the agency's determination to avoid rulemaking procedures in advance of announcing the new, retroactive requirements for post-1972 unitized fields prescribed in Ruling 1975-15. V R. 1328.

precluded the practice followed at the Walker Creek Unit of using "property-by-property" BPCL's and thereby retroactively eliminated all of the "new" oil that had been sold from the Unit. Although Pennzoil, on behalf of the Unit, immediately contested the legality of this Ruling and its retroactive imposition of new requirements not previously expressed in the regulations (III R. 679-86), the Unit nevertheless decided to comply prospectively with the ruling by establishing a unit BPCL effective September 1, 1975.

Confronted by widespread industry criticism of its newly asserted public position and the devastating impact of Ruling 1975-15 on incentives for unitization (VIII R. 2287-2326), the FEA announced on January 6, 1976, that it would reconsider the merits of its "interpretation" in Ruling 1975-15. The FEA specifically invited comments from the public on the Ruling's effects on incentives for enhanced recovery projects. 41 Fed. Reg. 1564 (Jan. 8, 1976). Extensive after-the-fact comment led to a partial rescission *ab initio* of Ruling 1975-15. 41 Fed. Reg. 4931, 4936 (Feb. 3, 1976). On reconsideration, the FEA abandoned the original premise of the Ruling, which was that upon unitization a new "right to produce" or "property" arose that required a unit BPCL. In its place, the FEA substituted a requirement premised on the view that a unit BPCL was necessary only after a "significant alteration in producing patterns" occurred at a unit, although the meaning of this new phrase was not then defined. The FEA reasoned that "until such time as there is a significant change in producing patterns, there is no reason for the unit operator to depart from the *historical practice of determining quantities of new crude oil on a lease-by-lease basis.*" *Id.* (emphasis added). The agency did, however, adhere to its claim that Ruling 1975-15, as amended to incorporate a

"significant alteration in producing patterns" test, represented what was always implict in and required by the regulations.[9]

3. The agency audited Pennzoil and the Walker Creek Unit for two years in 1976-1977. At the termination of the audit in December, 1977, no pricing violation concerning Walker Creek crude oil was alleged. However, in early 1978, the DOE commenced a highly publicized enforcement action against another unit operator on the basis of Ruling 1975-15. This action prompted the Walker Creek Unit interest owners to authorize Pennzoil to bring suit to determine the validity of Ruling 1975-15 as retroactively applied by the agency. Pennzoil filed its complaint on August 4, 1978. Failing in its initial effort to have Pennzoil's complaint dismissed for lack of ripeness,[10] the DOE filed a counterclaim alleging overcharges in the pricing of crude oil from the Unit and seeking civil penalties against the Unit. The district court stayed that counterclaim pending a

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[9] The February 1976 partial rescission of Ruling 1975-15 was not the agency's last effort at grappling with the issue. On April 13, 1976, the FEA initiated a rulemaking proceeding to clarify the effect of its partial rescission of Ruling 1975-15. 41 Fed. Reg. 16179 (April 16, 1976). Comments were solicited with respect to the determination of when "there has been a significant alteration in producing patterns." *Id.* at 16181. No proposed definition of this term was published, however. Final regulations were forthcoming on August 20, 1976, 41 Fed. Reg. 36172 (Aug. 26, 1976), which, effective September 1, 1976, adopted definitions of "significant alteration of producing patterns," "unit BPCL" and "unitized property" for purposes of 10 C.F.R. § 212.75. These rules, however, did not apply to units formed prior to February, 1976, such as the Walker Creek Unit. On January 19, 1977, the agency again sought to "clarify" Ruling 1975-15 and all of the pronouncements in its wake by the promulgation of yet another "interpretation," Ruling 1977-2, 42 Fed. Reg. 4409 (Jan. 25, 1977).

[10] Pennzoil v. DOE, 466 F. Supp. 238 (D. Del. 1979).

final determinaton on the threshold legal issues raised in Pennzoil's declaratory judgment action that is now before this Court.

Following extensive discovery, in January, 1981 Pennzoil requested a trial date from the court. The DOE, however, moved for summary judgment on Pennzoil's amended complaint. In support of its motion, the DOE contended that Ruling 1975-15 was reasonable and therefore *ipso facto* an "interpretive" rule to which the court should defer. The DOE also claimed that *Grigsby* v. *DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979), had decided the "central issue" in the case and should be dispositive under the doctrine of *stare decisis*. In opposing the DOE's motion for summary judgment, Pennzoil distinguished *Grigsby*, which did not concern the application of the regulations to post-1972 multiple-property units. In addition, Pennzoil presented a voluminous factual record showing that Ruling 1975-15, as applied to post-1972 multiple-property units, was contrary to the agency's original intent in adopting the underlying regulations and was inconsistent with the agency's contemporaneous construction of these regulations, its public pronouncements preceding the issuance of Ruling 1975-15 in August, 1975, and its general enforcement rationale under the regulations to the present day.

As part of its evidentiary submission, Pennzoil presented hundreds of pages of early agency documents, supplemented by the affidavit testimony of the drafters of the two-tier price system (the CLC's General Counsel and the director of CLC's Energy Division), as well as affidavits from agency officials involved in the original implementation of the regulations. This evidence reveals that the CLC, in carefully tailoring the two-tier price regulations to provide incentives for unitization and enhanced recovery proj-

ects, intended that separate properties in existence in 1972 remain the "properties" for regulatory purposes "even if they later become included in a unitized field," thus preserving the opportunity for a unit to produce some "new" oil while undertaking costly enhanced recovery operations. V R. 1427-31; 1564. Pennzoil's proffered documents and testimony also illuminated the CLC's intent to create a fixed 1972 "property" and production base (described as taking a "snapshot in time." V R. 1439), which would not be affected by future adjustments or changes in ownership or production rights, so as to prevent gerrymandering of property boundaries to create "new" oil.

Additionally, Pennzoil offered evidence of the agency's contemporaneous construction of § 212.72 confirming that the advice given to the Walker Creek Unit was consistent with guidance given other producers by CLC officials charged with providing such advice to the industry, IV R. 1161-62, 1170, including advice from the CLC's first General Counsel. IV R. 1173-74. The evidence also included documented interpretations by officials of the Internal Revenue Service, which initially enforced the CLC petroleum regulations, showing that these officials *rejected* the treatment of a multi-lease unit as the "property." IV R. 1163-67. These documents and affidavits revealed that *for at least the first sixteen months* following the adoption of the regulations, the agency's guidance to regulated parties, almost without exception, was inconsistent with the later announced "interpretation" in Ruling 1975-15. In fact, not until February, 1975 did the Office of General Counsel render a private letter interpretation indicating a contrary position arguably consistent with Ruling 1975-15. III R. 664. There, however, that office rejected a producer's request to treat a post-1972 unit as a wholly "new" property with a zero BPCL, instead observing that all production

from the leases in existence in 1972 should be taken into account for BPCL purposes. This letter interpretation, which was not authored until sixteen months *after* the underlying regulations were adopted, was also not published until March, 1977, in violation of the Administrative Procedure Act (APA). *See* 5 U.S.C. § 552(a)(1) and (2); *Morton* v. *Ruiz*, 415 U.S. 199 (1974).

In contrast to this private, unpublished General Counsel's interpretation cited by the DOE in support of summary judgment, Pennzoil pointed to the *public statements* of an agency official (IV R. 1215-18) and *published* decisions by the agency during this same period that continued to be irreconcilable with the position later adopted in Ruling 1975-15. On three occasions in 1975, decisions by the agency's Office of Exceptions and Appeals (OEA), which had review authority over private interpretations, 10 C.F.R. § 205.86, *denied* unit operators the option of treating a post-1972 multiple-property enhanced recovery unit as a single property, even though hardship or inequity was alleged to result from the individual-lease BPCL calculations employed by the operator. *Sun Oil Co.*, 2 FEA ¶ 83,075 (March 21, 1975); *Empire Drilling Co.*, 2 FEA ¶ 83,142 (May 9, 1975), *aff'd*, 2 FEA ¶ 80,676 (Sept. 2, 1975). *See* IV R. 1204-1208. Under the OEA analysis, "property-by-property" BPCL's were to be maintained even after unitization for enhanced recovery purposes. In addition, Pennzoil cited internal agency documents prepared in late 1974 and early 1975 that likewise conflicted with the agency's later assertion that Ruling 1975-15 was inherent in the regulations and represented a long-standing agency position. IV R. 1178-96; 1209-11. Among those documents was the agency's own enforcement manual in effect in 1975, which construed the regulations to permit "property-by-property" BPCL's as an "option." IV R. 1209-12.

Pennzoil argued that this evidence at a minimum raised factual issues material to the DOE's motion with respect to the weight to be given Ruling 1975-15 and the pertinent agency constructions to which the court should look for guidance. Without disagreeing, the district court entered judgment for the DOE solely on the limited basis that the case was controlled by *Grigsby* v. *DOE, supra*. That case had held that a drilling unit in existence in 1972 could not thereafter be fragmented into different properties for pricing purposes because the unit in 1972 represented the "right to produce," and hence the "property," but that a new unit which did *not* aggregate any existing "properties" could be treated as a "new" property with a zero BPCL if it did not exist in the base period. Seeing no distinction between that case and the instant case, the district court judge concluded that, whatever the regulatory history or contemporaneous construction evidence might indicate in the circumstances here, he was precluded from "reexamin[ing] square holdings of [the Temporary Emergency Court of Appeals]." App. 61a. On June 10, 1981, the district court entered judgment for the DOE pursuant to FED. R. CIV. P. 54(b). (App. D, *infra*).

4. In contrast to the analysis of the district court, on review the Temporary Emergency Court of Appeals (TECA) made only passing reference at the end of its opinion to the "concept of the right to produce" in *Grigsby* which the two-judge majority thought was applicable to this case. The majority, however, avoided an analysis of how this "concept" applied here. In a concurring opinion, Judge Jameson strongly disagreed with the majority's assertion, recognizing that the *Grigsby* "concept of 'right to produce' does not answer the question presented here, and the two cases are factually distinguishable." App. 55a.

Ranging far beyond the holding of *Grigsby*, the majority opinion instead upheld Ruling 1975-15 by relying primarily

on the DOE's version of the disputed facts regarding the purpose of and construction given § 212.72 and Pennzoil's conduct and motivations. By resolving all disputed factual issues in DOE's favor, the two-judge majority concluded that great deference should be accorded the DOE's *post hoc* "interpretation" in Ruling 1975-15. Citing five unpublished interpretations, only one of which concerned a post-1972 unit, the court further held that the agency's statements provided an "almost bright line of agency explanation . . . upon the particular principle in this case." App. 36a. In the process, the majority disregarded the unrebutted evidence of the agency's original intent, belittled or ignored evidence of the agency's earlier contemporaneous construction, and deferred to the agency's claim that its *post-hoc* interpretation was "implicit" in the regulations and therefore should be deemed controlling for the entire two-year period prior to its issuance. App. 30a, 40a.

All three judges concluded that Pennzoil was not entitled to protection from retroactive application of the newly announced standards of Ruling 1975-15. This conclusion rested on the majority's findings, based on inferences drawn for the first time on appeal, regarding Pennzoil's motivation and state of mind during the relevant period. Accepting the DOE's assertions, the majority held that

> Pennzoil was hardly an innocent abroad interpreting in the midst of confusing babble a direction sign labeled in a foreign language. It was an experienced traveler on familiar terrain perceptively advised by its own counsel in its own interest and deviating from the plainly indicated direction it had heretofore followed. App. 48a.

The concurring opinion by Judge Jameson took exception to the majority's characterization of the regulatory events, concluding instead that

> The contemporaneous construction of § 212.72, as revealed in these official Interpretations, OEA decisions, agency forms and manuals, informal telephonic communications, papers presented to industrial conferences, affidavits of former agency personnel, and post-1975 regulatory changes does not, in my opinion, provide 'almost a bright line of agency explanation . . . upon the particular principle in this case.' In fact, the DOE appears to have made little effort to insure that the industry was receiving a clear and consistent interpretation of § 212.72.
>
> The regulations here were ambiguous and there was uncertainty and confusion among both the DOE and the producers with respect to their interpretation. App. 54a.

However, Judge Jameson also concluded that "Pennzoil was not entitled to rely upon the interpretation for which it contends," finding that "[h]ere Pennzoil was fully aware of the uncertainty, confusion, and different interpretations but made no reasonable effort to obtain a ruling from the General Counsel of the DOE." App. 54a.

REASONS FOR GRANTING THE WRIT

In upholding summary judgment for the DOE, the Temporary Emergency Court of Appeals deferred to the agency's *post-hoc* interpretation expressed in Ruling 1975-15 even though it was not contemporaneous with the regulation it purported to construe, was inconsistent both with earlier agency constructions and with the original intent of the drafters of that regulation, was questioned and reconsidered after its issuance, and was based on a rationale which conflicts with the agency's general policy in applying the concept of "property." TECA's decision cannot therefore be reconciled with the standards articulated by this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 140 (1944) for evaluating the weight to be accorded an administrative interpre-

tation or with other decisions of this Court which delineate the basic principles of regulatory construction.

TECA compounded its mistaken analytical approach and its use of erroneous standards of construction by disregarding the fundamental principles of summary judgment procedure. Its decision fully accepted the moving party's factual assertions, which were never tested at trial and were disputed by Pennzoil. These factual assertions cannot serve as the basis for TECA's affirmance of summary judgment granted to the moving party. In deciding this case in this manner, TECA "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." [11]

1. In Uncritically Deferring to the Agency's *Post-Hoc* Interpretation, the Temporary Emergency Court of Appeals Disregarded the Standards Articulated by This Court and So Departed from the Normal Rules of Regulatory Construction as to Abdicate Its Duty to Provide Meaningful Judicial Review.

This Court has accorded deference to contemporaneous, continuous, consistent agency interpretations, *see, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), but has also recognized that deference to such interpretations is not itself an absolute or hard and fast rule. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). At a minimum, to be accorded judicial deference, an administrative interpretation must be consistent both with the statutory delegation of authority to the administrative agency and with the agency's own prior pronouncements. *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976); *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza* v. *Farah Manufac-*

[11] Sup. Ct. R. 17.1(a).

turing Co., 414 U.S. 86, 93-94 (1973). Deference is not a substitute for analysis, because, as this Court held in *Skidmore*, the weight to be accorded an administrative interpretation

> depends on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.

Id. at 140. TECA ignored this analytical standard in according virtually uncritical deference to Ruling 1975-15 and accepting without serious question DOE's assertion that its interpretation was "inherent" in the regulation. The majority found that "inherent in the ['property'] regulation was the property concept, thus furnishing a meaningful guide for applying the definition," and on this basis concluded "that the controlling concept of Ruling 1975-15 was implicit in the regulatory definition of 'property.'" App. 26a, 30a. And to the extent that TECA purported to evaluate Ruling 1975-15 under the *Skidmore* analysis, it did so on the basis of complete acceptance of the DOE's factual assertions, which were disputed by Pennzoil and untested in the trial court, and in reliance on unpublished interpretations in violation of the APA.

TECA fundamentally erred in accepting the DOE's claim that unpublished interpretations provided a "bright line of agency explanation" predating and supportive of Ruling 1975-15 as it applied to post-1972 units. This "bright line" did not even begin until *sixteen months after* the regulations were in place and consisted of five private letter interpretations, four of which addressed a different, non-analogous issue (pre-1972 units), none of which were publicly available during the relevant period, and none of which were, *even in the agency's view* at that time, applicable beyond

the particular facts and circumstances addressed, thus eliminating their applicability to third parties. 42 Fed. Reg. 7923 (Feb. 8, 1977). In this regard, TECA simply ignored the mandate of the APA, which provides that such unpublished "interpretations" may not be "relied on, used, or cited as precedent by the agency" unless a private party has "actual and timely notice" thereof. 5 U.S.C. § 552 (a)(2). These unpublished, private interpretations, however, were accorded determinative weight by the majority despite the earlier, contemporaneous constructions and *published* decisions that contain contrary and unequivocal explanations of the application of the regulations in the *precise* circumstances of post-1972 enhanced recovery units. Moreover, the *published* decisions were rendered by the agency's appellate body, the OEA, which had review authority over private interpretations. *Compare* App. 31-34a *with* App. 51-53a.

TECA further erred by dismissing the uncontested facts showing the agency's *contemporaneous* construction as evidenced by the statements and actions of its own policymakers and lawyers in developing and implementing the "property" and "BPCL" rules. *See, e.g., Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 314-15 (1933). Yet an analysis of the agency's application and practical construction of the regulations during the period prior to issuance of a "formal" interpretation is necessarily required under the standards adopted by this Court in *Skidmore, supra,* to determine whether a later "interpretation" is consistent with prior administrative constructions. *See General Electric* v. *Gilbert, supra.*

The evidence tendered by Pennzoil, which was similar to, if not more compelling than that relied on by TECA in other cases, *e.g., Standard Oil Co.* v. *DOE*, 596 F.2d 1029, 1055 (TECA 1979), reveals that policymakers, lawyers in

the General Counsel's Office (including at least the agency's first General Counsel), and enforcement personnel (including local auditors, regional compliance officials, and national office administrators) *did not originally view the regulations as imposing special requirements for established "properties" later included in a post-1972 unit*—requirements that the TECA majority nevertheless found "inherent" in the regulations. This evidence also shows a consistent construction of the regulations to require producers to refer to "properties" *as they existed in 1972* for pricing purposes—an important governing principle, signalled on the face of the regulations, which was adopted by its drafters to assure consistency in "property" designations. V R. 1439; 1565. This principle, too, is irreconcilable with Ruling 1975-15, and was in fact formally expressed only three months after adoption of § 212.72 when the CLC promulgated the parallel property definition in the "stripper well" exemption regulations. To conclude, as TECA did here, that such regulatory facts must necessarily yield to a so-called formal "interpretation" issued years later (App. 27a) effectively shields the agency from meaningful judicial review of the "interpretative" process.

Moreover, this Court has refused to enforce administrative interpretations where an agency has taken mutually contradictory and inconsistent positions as to the meaning of its own regulations. *See, e.g., United Housing Foundation, Inc.* v. *Forman,* 421 U.S. 837, 858-59 n.25 (1975). Ignoring this principle, TECA determined that the agency's position on the application in other contexts of the same regulation in issue here was irrelevant to an assessment of Ruling 1975-15. App. 30a. By so holding, TECA refused to consider the fact that the DOE has consistently relied on a concept of "property" which, with the sole exception of Ruling 1975-15's application to post-1972 units, requires

that properties *not be changed* and that prices continue to be calculated on the basis of the property *as it existed in 1972*. As a result of its narrow analysis, TECA failed to evaluate the agency's reasoning in support of Ruling 1975-15 as compared to its reasoning in analogous contexts, and gave no consideration to the need to harmonize the regulatory principles espoused by the agency. *See, e.g., Weinberger* v. *Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973). Nor did TECA pause even to consider how the "inherent property concept" advocated by DOE and here endorsed by TECA (App. 26a) could yield diametrically different results when the same regulation is applied in other situations.

TECA's novel rationale of finding "inherent concepts" to underwrite Ruling 1975-15 effectively obliterates the long-standing distinction between the role of the courts in reviewing "legislative" and "interpretative" rules. Interpretative rules are not subject to the prior notice and comment procedures of the APA that apply to legislative rules and provide a safeguard against ill-considered agency actions. For this reason, settled doctrine requires closer court scrutiny of an agency's interpretative position under the command of *Skidmore*. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.00-7 (1982 Supp.).

Under TECA's analysis, however, *interpretative* rules are due special deference by the courts simply because the agency possesses authority to issue legislative rules. App. 28-29a. TECA's formulation of this principle as applied to Ruling 1975-15 made it unnecessary to evaluate the weight that should be given to the agency's interpretation so long as the agency had the statutory authority to issue legislative rules and the "concept" of the interpretation could be found to be "implicit" in the regulation. App. 30a.

The authority to issue legislative rules cannot, however, provide an independent basis for according deference to an agency that eschews the educational process incorporated in notice and comment rulemaking and instead chooses to perform its duties through *post-hoc* "interpretation." Thus, whereas the *Skidmore* standards enable a reviewing court to accord "varying degrees of deference" to administrative interpretations, "based on such factors as the timing and consistency of the agency's position, and the nature of its expertise," *Batterton* v. *Francis*, 432 U.S. 416, 425 n. 9 (1977), the TECA majority in this case limits the applicability of these standards to instances in which the agency was not granted any "lawmaking power" by statute—an unprecedented and fundamentally unsound position. Indeed, TECA's failure to apply the *Skidmore* standards to a *post-hoc* interpretation, coupled with its special rule of deference, in practice frees an agency to act in all instances as it did here, *to wit:* to draft ambiguous regulations; to ignore long-standing internal agency concern over the need to publish guidance and resolve these ambiguities; to decide, without considering public comment or prior agency practice, what the ambiguous regulations should now mean; and to enforce this new meaning retroactively.

The policy furthered by the imposition of limits on judicial deference to agency action is that judicial review must be meaningful if it is to serve any purpose. Instances of serious abuse of the deference principle, if unchecked by this Court, can result in injustice in a particular case and may also invite legislative restrictions on the judicial process itself. As the Senate Judiciary Committee has stated, "the judicially created doctrine of deference to agency interpretations of law . . . places the bureaucratic thumb on the scales of justice, weighting them against the citizen." S. Rep. No. 284 (to accompany S. 1080), 97th Cong., 1st

Sess. 170 (1981). To remove what it perceived to be "a virtual presumption of correctness" of agency action and to underscore the importance of the *Skidmore* standards in determining the weight of agency interpretations of law, the U.S. Senate has passed unanimously and the House Judiciary Committee has reported favorably, regulatory reform legislation.[12] Both bills include amendments to Section 706(c) of the APA, and a relevant portion of the bill passed by the Senate states as follows:

> In making determinations on other [*i.e.*, non-jurisdictional] questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.

One house of Congress has expressed its unanimous disapproval of the very kind of presumptive non-analysis employed by TECA in this case, and the other house is presently weighing the same issue. To allow TECA's decision to stand may signal that legislative supervision of judicial review of administrative action is both desirable

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[12] S. 1080, 97th Cong., 2d Sess. (1982), *see* 128 Cong. Rec. S2713-21 (daily ed. March 24, 1982); H.R. 746, 97th Cong., 2d Sess. (1982), *see* 127 Cong. Rec. H73 (daily ed. January 6, 1981) (bill introduced) *and* H.R. Rep. No. 435, 97th Cong., 2d Sess. (1982) (report of House Comm. on Judiciary). The report accompanying S. 1080 made it clear that the committee's intent in amending the scope of review provision in Section 706 of the APA was not to preclude judicial consideration of agency expertise, but rather to ensure that administrative interpretations be scrutinized under the *Skidmore* standards, and that their validity would not "depend on some general rule of deference or presumption of validity." S. Rep. No. 284, 97th Cong., 1st Sess. 171 (1981).

and necessary. This Court's review of this case is therefore vital to reassert the proper standards of review for an administrative interpretation and the correct principles of regulatory construction. It is particularly important here, [since] the TECA opinion [construes] the core regulation of the entire crude oil price [control] system, which continues to be at issue in hundeds of DOE enforcement actions. Thus, the ramifications of TECA's opinion extend far beyond the liability and potential penalties to which Pennzoil is exposed and provide a compelling reason for the writ to issue.

2. TECA's Adjudication of Material Factual Disputes for the First Time on Appeal was Improper, and Its Decision to Affirm Summary Judgment in the Face of Factual Disputes Violates the Summary Judgment Principles Established by This Court.

A series of factual determinations was plainly material to TECA's decision to affirm the grant of summary judgment for the DOE. TECA first resolved questions concerning the reasonableness of Ruling 1975-15 in light of the goals of the two-tier price system. TECA next reached factual conclusions about the relevant regulatory events and the weight to be accorded evidentiary facts in assessing the consistency and coherence of the agency's actions prior to and after Ruling 1975-15. Finally, TECA drew inferences regarding Pennzoil's motivation, intent and state of mind throughout the period preceding the announcement of Ruling 1975-15. Pennzoil's evidence, however, completely contradicts the factual assertions on which these conclusions rest. And because these facts are in dispute, TECA's disposition of Pennzoil's appeal violated this Court's fundamental principle that summary judgment must be denied where *any* material factual controversies confront the court.

Adickes v. *S. H. Kress Co.*, 398 U.S. 144 (1970); *United States* v. *Diebold, Inc.*, 369 U.S. 654 (1962) (per curiam). Adherence to this principle required a remand by TECA to the district court for trial. *E.g.*, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473-74 (1962); *United States* v. *Diebold, Inc.*, 369 U.S. at 655. TECA, however, rejected this course, arrogated to itself the fact-finding function of the trial court, and compounded this error by resting its decision exclusively on the DOE's factual assertions that were disputed by Pennzoil. Such egregious violations of this Court's settled legal principles require review and correction.

The decisions of this Court plainly establish that summary judgment under FED. R. CIV. P. 56(c) may be affirmed only where the moving party has established that it is "entitled to judgment as a matter of law, where it is quite clear what the truth is . . . [and where] no genuine issue remains for trial." *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944), *quoted in Poller* v. *Columbia Broadcasting System*, 368 U.S. at 467. In making this determination, the court must view all inferences drawn from the underlying facts "in the light most favorable to the party opposing the motion." *United States* v. *Diebold, Inc.*, 369 U.S. at 655. Here, however, DOE not only failed to negate the existence of any material factual issues, but Pennzoil presented extensive evidence to the district court supporting its claims and disputing those of DOE, thus requiring a resolution of the parties' differing versions of the truth at trial. *See First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968). The trial court considered none of this evidence, basing its decision exclusively on the purported *stare decisis* effect of *Grigsby, supra.* App. 57a. TECA, in contrast, reached far beyond *Grigsby* to uphold Ruling 1975-15 on separate and independent

grounds, but only after sifting the evidence in the record and making factual findings upon which to base its legal conclusions.[13]

Focusing on Pennzoil's motivation and intent, TECA first accepted the DOE's assertions that Pennzoil's treatment of its pre-1972 Tinsley field units as single properties was inconsistent with the use of "property-by-property" BPCL's for Walker Creek and then concluded, with no evidentiary basis, that Pennzoil had ignored what it knew was the plain meaning of the regulation as part of "a pointed scheme for increasing Walker Creek Unit profits." App. 22a. Pennzoil strongly disputes this characterization, and presented substantial evidence to the trial court (which was never considered) to show that the treatment of the pre-1972 Tinsley field units as single properties accorded with its historical practice and consistent application of § 212.72. This consistent application of § 212.72 required that "property" designations be based on producing entities "as they existed in 1972." *See supra*, at 4-5. The Walker Creek Field was not unitized until 1974. Accordingly, the continued use of the individual tracts within the Walker Creek Field as the "properties" for determining BPCL's was fully consistent with Pennzoil's use of a single BPCL for the Tinsley units, which themselves existed as the properties in

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[13] "The reviewing court cannot decide disputed issues of material fact; it only may determine whether a genuine issue exists and whether the law was applied correctly." 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2716, at 437-38 (1973). Provided that "reasonable inferences could be drawn [from the facts in the Record] such that the issue would be submitted to the trier of fact, then *Rule 56(c) leaves us no latitude* and *we must* return that issue to the trier of fact, in this case the judge." Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962) (emphasis added).

1972.[14] TECA's contrary finding, ignoring as it did Pennzoil's actual practice, improperly resolved this material factual controversy on summary judgment.

TECA reached additional factual conclusions regarding Pennzoil's understanding of the advice received in 1974 from the FEA and Pennzoil's actions after receiving such advice. The court of appeals determined that a senior agency official's express approval of "property-by-property" BPCL's was nothing more than "an invitation to seek advice from [the General Counsel's Office] and a warning that if [the Unit] did not do so it was proceeding at its own peril." App. 22a. Yet Pennzoil offered evidence rebutting this inference, and supporting the view that the pattern of advice given Pennzoil and the Unit permitted the reasonable conclusion that the issue was *not then* an open one and that a *rulemaking*—with an opportunity to comment—would be required to alter the regulations if the agency intended different treatment for multi-property units formed after 1972. *E.g.*, V R. 1549.

The majority opinion further determined (without factual support) that Ruling 1975-15 rationally balanced the objectives of the two-tier pricing structure and that "Pennzoil's reading of the definition would disregard [this balancing]." App. 27a. These conclusions rest on DOE's assertions and hypotheses regarding the nature and mechanics of field unitization and the actual impact of different regulatory applications. In contrast, Pennzoil presented evidence (never considered by the trial court) showing that "prop-

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[14] In fact, the opening section of Ruling 1975-15 expressly endorsed this treatment, explaining that while the "property concept is one that identifies *the right to produce*," the "producer *must* refer to the right to produce crude oil *as it existed in 1972* in order to define the property involved." 40 Fed. Reg. 40832 (Sept. 4, 1975) (emphasis added).

erty-by-property" BPCL calculations advanced the goals of the two-tier price system by maintaining an incentive to form enhanced recovery units such as Walker Creek, V R. 1536, 1365, and that this practice in fact reflected the intent of the drafters of § 212.72 who designed the two-tier system. V R. 1434-37, 1504-05. Again, this factual controversy precludes summary judgment. *E.g., Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257 (1948) (summary judgment reversed where trial record was insufficiently developed to decide "complicated courses of legislation, contracting and practice" at issue).

Divergent conclusions by different members of the TECA panel about the consistency of the DOE's position before and after Ruling 1975-15 unmistakably highlight other material factual disputes. While the TECA majority concluded that the evidence revealed a "bright line of agency explanation . . . clear and steadfast on the particular principle in this case," Judge Jameson, viewing the same record, found no "inherent concept" in the property definition and determined that the DOE itself was confused and uncertain, rather than "clear and consistent," as to what its regulations meant.[15] These fact issues, and the others resolved by TECA, are material to central questions in this case: (1) whether Ruling 1975-15 was inherent in or consistent with the underlying "property" and BPCL regulations of Section 212.72, and (2) whether the DOE's *post-hoc* interpretation accurately reflects the *contemporaneous* meaning given the "property" and BPCL definitions of Section 212.72 by those who were "charged with the responsibility of setting [the] machinery in motion, of

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[15] *Compare* App. 36a *with* App. 54a. Judge Jameson also viewed the credibility of Pennzoil's affiants differently than did the majority and reached different conclusions as to the weight to be accorded their sworn testimony. *Compare* App. 53a *with* App. 11a, 49a.

making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.).

TECA recognized the disputed nature of these factual issues. It acknowledged that Pennzoil had offered substantial evidence rebutting the DOE's factual claims. The court drew on selected portions of that evidence in reaching its own conclusions. But in so doing, TECA usurped the role of the trial court. As TECA's decision plainly shows, that court had to untangle a complicated skein of regulatory construction, interpretation, and administrative practice,[16] and resolve as well issues of intent and state of mind.[17] In proceeding *sua sponte* to adjudicate these factual controversies on appeal, TECA ignored this Court's salutary admonition in *Kennedy* v. *Silas Mason Co.*, that

> the hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, and ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts is a task primarily for a court of one judge. . . .

334 U.S. at 256.

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[16] *Compare* TECA's decision in *McWhirter Distributing Co.* v. *Texaco, Inc.*, which reversed a grant of summary judgment, holding that "[s]ummary procedures . . . should not be based upon indefinite factual foundations involving a welter of statutory or regulatory provisions the application of which may depend on undeveloped facts." 4 Energy Mgmt. (CCH) ¶ 26,310 at 28,392 (TECA June 1, 1981) (Christensen, J.).

[17] This Court has continually held that summary judgment is inappropriate "where motive and intent play leading roles." Poller v. CBS, 368 U.S. at 473.

In its analysis and disposition of Pennzoil's appeal from summary judgment, TECA has veered sharply from the accepted and usual course of judicial proceedings. Its actions warrant review to ensure that TECA in the future observes fundamental principles of judicial administration. If TECA remains insulated from the prospect of review by this Court and continues to treat with extreme deference agency characterizations of both law *and* fact, regulated parties will be effectively deprived of the independent judicial review which Congress intended when it established TECA in 1971.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the decision of the Temporary Emergency Court of Appeals.

Respectfully submitted,

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June 16, 1982

Temporary Emergency Court of Appeals of the United States

No. 3-27

PENNZOIL COMPANY, PLAINTIFF-APPELLANT,

v.

UNITED STATES DEPARTMENT OF ENERGY, SECRETARY JAMES B. EDWARDS, and the UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES,

EXXON CORPORATION; TEXAS INDEPENDENT PRODUCERS and ROYALTY OWNERS ASSOCIATION; CALDWELL SCHOOLS, INC., ET AL.,; NANCY ABERNATHY, ET AL., and O. B. MOBLEY, JR., AMICI CURIAE.

Appeal from the United States District Court
for the District of Delaware

No. (C.A. 78-335)

(Argued: November 13, 1981 Decided: April 6, 1982)

JOHN P. MATHIS, Baker & Botts, Washington, D.C. with whom Randolph O. McManus of the same firm; Perry O. Barber, Jr., James W. Shaddix and Jay G. Martin, Pennzoil Company, Houston, Texas; and Bruce M. Stargatt and Jack B. Jacobs, Of Counsel, Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, were on the brief for the Appellant.

LARRY P. ELLSWORTH, Department of Energy, Office of General Counsel, Washington, D.C., with whom Frank W. Krogh and Daniel F. Shea of the same agency; Joseph J. Farnam, Jr., U. S. Attorney and Peggy L. Ableman, Assistant U. S. Attorney, District of Delaware; and George Kielman, Dean S. Cooper and Gilbert T. Renault, Department of Energy, Office of Special Counsel, Washington, D.C., were on the brief for the Appellees.

David J. Beck, David L. Tolin and Ronald D. Secrest, Fulbright & Jaworski, Houston, Texas; David R. Johnson and John M. Simpson, Fulbright & Jaworski, Washington, D.C.; and Barbara Finney, Exxon Corporation, Houston, Texas, were on the brief for the *Amicus Curiae*, Exxon Corporation.

Scott Anderson, TIPRO, Austin, Texas; and Joe A. Rudberg and James B. Harris, Thompson & Knight, Dallas, Texas, were on the brief for the *Amicus Curiae*, Texas Independent Producers & Royalty Owners Association.

Leonard E. Davis and Michael E. Jones, Potter, Guinn, Minton, Roberts & Ireland, Tyler, Texas, were on the brief for *Amicus Curiae*, Caldwell Schools, Inc.

A. D. Clark, Jr., Tyler, Texas; Neal Hawthorn, Longview, Texas; and F. Lee Lawrence, Lawrence and Lawrence, Tyler, Texas, were on the brief for the *Amici Curiae*, Nancy Abernathy, *et al.*

John L. Schober, Jr., and Walter F. Clawson, Schober, Clawson & Brabham, Shreveport, Louisiana, were on the brief for *Amicus Curiae*, O. B. Mobley, Jr.

Before CHRISTENSEN, JAMESON and MAXWELL, Judges.

CHRISTENSEN, Judge.

This action was brought in the district court by Pennzoil Company against the Department of Energy (DOE) and its Secretary[1] to attack the validity of a

[1] The United States was added as a party defendant upon motion of the other defendants so that a counterclaim could be interposed against Pennzoil for enforcement of the ruling challenged by plaintiff's action. The district court entered final judgment on plaintiff's claim, leaving the counterclaim for later disposition if the agency ruling should be sustained on appeal. We hereafter refer to "DOE" as the representative of the position of all named defendants in matters germane to this appeal and as successor of various predecessor agencies issuing or interpreting foundational regulations and the ruling in question.

1975 ruling of the Federal Energy Administration as "retroactively" applied to the crude oil production of the unitized Walker Creek Field operated by Pennzoil in the State of Arkansas. From a summary judgment adverse to it, Pennzoil has appealed.

The substantive problem presented here involves the regulatory definition of "property" in DOE's administration of the "two-tier" crude oil pricing system. Procedurally, the case presents an aspect of the "interpretation" vs. "rulemaking" problem not unfamiliar to this court. A simplified statement of the regulatory context may be helpful before we explore the labyrinth of regulations, affidavits, opinions, cases and arguments with which we are confronted.

Under federal price control regulations, ceiling prices for crude oil were determined during material times by comparison of historical and current levels of production from a given "property." "Property" was defined as "the right which arises from a lease or from a fee interest to produce crude petroleum." The quantity produced from a "property" in the designated base year was established as the "base production control level" (BPCL). Current production at or below the property's BPCL was deemed "old" oil, while production above a property's BPCL qualified as "new" oil. "Old" oil was subject to the lower-tier price and "new" oil together with a corresponding amount of "released" oil[2] warranted the higher price.

Again stated only conceptually to lend point to what follows, the two-tier oil pricing system required producers to report, on a property-by-property basis, the portion of their crude oil production that had to be sold at the lower-tier controlled price and the portion eligible for sale at the

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[2] An earlier version of 10 C.F.R. § 212.74 entitled a producer to "release" a barrel of "old" at the "new" oil price for each barrel of "new" oil produced in a given month. *See* 39 Fed. Reg. 1924 (Jan. 15, 1974); 39 Fed. Reg. 31622 (Aug. 30, 1974); Energy Mgt. (CCH) ¶ 15,474.

upper-tier or market price. These determinations were to be made by comparing each property's current monthly production with the property's historic 1972 production. When property was unitized [3] before 1972, the BPCL of this single "property" was the aggregate production of the constituent leases in 1972 to be compared to the total production of the leases within the unit in the current year. This application of the "property" concept is not questioned here.

The catch comes in this case when for the base year the properties were separate leases yet thereafter those leases were unitized so that the single unitized "right to produce" then became the "property." Absent unitization, if a lease which had production of a given amount in 1972, the base year, produced in a subsequent year an increased amount of oil, such increase would be counted as new oil

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[3] The term is generally used to denominate the joint operation of all or substantially all of the separately owned producing tracts of a producing reservoir or an entire field which is undertaken after the field has been developed using primary production methods under non-unitized operations. "Unitization" is therefore to be distinguished from "Pooling," which describes the bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules (generally the formation of a single-well "drilling" or "spacing" unit). *See* R. Langenkamp, *Petroleum Reference Dictionary* 182 (1980); Williams & Meyers, *Oil and Gas Law* (Abridged) § 901, at 593; Rocky Mountain Mineral Law Foundation, "Spacing, Pooling and Unitization," Landman's *Legal Handbook* 148, 158 (3d ed. 1977). Field-wide unitization represents a voluntary undertaking generally based on the agreement and approval of a substantial majority of the owners of operating interests and royalty interests in the field, and only following such concurrence may the state regulatory agency authorize unit operations and impose unitization on any minority of non-consenting interest owners. *See, e.g.*, Ark. Stat. Ann. § 53-115C-2. The requisite percentage of approval ranges from 62.5 percent under some state statutes to as much as 85 percent under other statutes. Williams and Myers, *Oil and Gas Law* (Abridged) § 913.5, at 604.

free from old oil price constraints. However, if later it became, together with other leases, a part of a unit producing less oil than did the total of the constituent leases in 1972, the example lease may have produced more oil than in 1972, but no increased production of the unit as a whole would have occurred because of the reduced production of other leases constituting the unit.

If DOE is right, as the district court held, the 1972 base production control levels of the leases later designated a unit must be aggregated for comparison with the total production from the unit during the critical periods in determining the quantity to be priced as new oil, if any; whereas if Pennzoil's contentions are accepted, any increased current production from one lease resulting from a reduction or elimination of production from another lease in the unit could have been properly sold at the higher price even though aggregate production from all of the leases forming the unit had been reduced from its 1972 level.

The district court in granting summary judgment in favor of DOE held[4] that *Grigsby v. Department of Energy*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979), was controlling against Pennzoil's position. This Pennzoil disputes as it presents these issues on appeal:

> 1. Whether *Grigsby* v. *DOE*, 585 F.2d 1069 (TECA 1978), precluded the district court's examination of the record in determining whether the "property" and BPCL rules of 10 C.F.R. § 212.72 required aggregation of the 1972 BPCL's of individual "properties" included within a multiple-property, enhanced recovery unit formed after 1972, for purposes of calculating "new" and "released" oil.

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[4] Pennzoil Co. v. Department of Energy, 514 F.Supp. 516 (D. Del. 1981). *See also* 480 F.Supp. 1126 and 466 F.Supp. 238, reporting interlocutory rulings in the same case.

2. Whether Section II-B of Ruling 1975-15 was validly promulgated insofar as it purported to require abandonment of 1972 "properties" and aggregation of their BPCL's upon formation of a post-1972 multiple-property, enhanced recovery unit?

Implicit in the latter issue is Pennzoil's contention that Ruling 1975-15 announced a new rule not previously inherent in or justified by the regulations which it purported to interpret. The briefs of amici curiae generally track appellant's contentions with variations which we shall address to the extent deemed significant on this appeal.[5]

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[5] Exxon Corporation contends that *Grigsby* does not control the case, arguing, among other things, that the district court erroneously concluded that *Grigsby* requires all units created after 1972 to compute a unit BPCL under Ruling 1975-15; that there was error in not applying here the analysis of Standard Oil Company v. DOE, 596 F.2d 1029 (TECA 1978); that to the extent *Grigsby* is applicable to a court granting summary judgment as in this case, that decision implicitly approves Pennzoil's interpretation of the property definition; and that the district court erred in failing to harmonize the "property" and "BPCL" definitions with the existence of the 1972 base period. The Texas Independent Producers & Royalty Owners Association argues that the district court erred in not applying the analysis of *Standard Oil*, and that to the extent *Grigsby* is applicable to a ruling on summary judgment it implicitly approves Pennzoil's interpretation of the property definition. Caldwell Schools, Inc., et al., maintain that the ruling in question involves a change in meaning invalid by reason of its retroactive application and because it was not "required." The brief of Nancy Abernathy, et al., argues that the Ruling is arbitrary and capricious; that its retroactive application would upset the reasonable reliance of working interest and royalty owners upon the "plain meaning" of the property definition; that even though the meaning of the regulation was clear, the agency interpretation would have to be rejected because it was not "compelled"; and that *Grigsby* does not mandate that the Ruling be upheld as valid when applied to voluntary post-1972 unitization of multiple wells and multiple leases on a field-wide basis undertaken for

I. *Proceedings and Decision in the District Court*

In its amended complaint Pennzoil alleges that prior to field-wide unitization its Walker Creek Field consisted of wells drilled on each of 39 320-acre tracts, each tract being certified as a separate "property" and assigned a separate BPCL based on 1972 production, with the specific quantities of "old," "new," and "released" oil determined by measuring the current monthly production and sales against the BPCL of each tract for the corresponding month of 1972; that following creation of the Walker Creek Field Unit on May 1, 1974, and designation of Pennzoil as operator, production was reduced in the Unit to conserve reservoir energy and to lower gas production, and that injection operation began March 18, 1975; that "from May 1, 1974 through August 31, 1975, Pennzoil continued to calculate production from the Unit on a tract-by-tract basis, which had the effect of assigning BPCL's to each lease, for purposes of documenting and certifying volumes of 'old' and 'new oil' "; and that such treatment "was in keeping with the . . . definition of 'property' as adopted by the FEA, and was concurred in by FEA officials in conversations during the summer of 1974."

Pennzoil further alleged:

> 23. After the FEA issued Ruling 1975-15, Pennzoil, on September 1, 1975, adopted the "single property" approach to certifying production from the Unit, and a BPCL for the Unit based on 1972 production was established. As a consequence, from September 1, 1975 through January 31, 1976, no new oil was claimed from the Unit. Since Pennzoil concluded that Ruling 1975-15 was not applicable retroactively to the pre-September 1975 period, Pennzoil did not alter its

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purposes of enhanced or secondary recovery. O.B. Mobley, Jr., contends that the district court ignored "overwhelming evidence" in the record that Ruling 1975-15 is invalid under the *Standard Oil* doctrine.

prior certification of "old," "new," and "released" crude oil for the period May 1, 1974 through August 31, 1975. Had Pennzoil applied Ruling 1975-15, as originally issued, retroactively, no "new" or "released" crude oil would have been produced from the Unit from May 1, 1974 through August 31, 1975.

After several interlocutory rulings, extensive discovery, and briefing, the district court denied Pennzoil's motion for summary judgment and granted DOE's motion for summary judgment on plaintiff's amended complaint, expressly determining that there was no just reason for delay and ordering "that the clerk enter final judgment for defendants pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, on all claims raised by plaintiff in its amended complaint." The case is here on a timely appeal from this judgment.

The district court held, 514 F.Supp. at 517, that Ruling 1975-15 "effected no change in the pre-existing law" and thus was not a legislative rule representing a substantive policy choice requiring compliance with the notice and comment requirements of the Administrative Procedure Act and the Federal Energy Administration Act. Disposing of plaintiff's claims on the basis of *Grigsby*, Judge Stapleton observed that that case "would seem to foreclose anyone operating a unitized property from determining 'new oil' on the basis of a comparison between current production on individual leases subject to the unitization agreement or order and the 1972 production from those individual leases," and rejected Pennzoil's argument that, despite subsequent unitization, "property" boundaries were frozen as they existed in 1972.

The district court specifically addressed Pennzoil's argument that the holding in *Grigsby* had no application to units created after 1972, noting that there was nothing in TECA's analysis of Grigsby's position which would support the distinction Pennzoil sought to make. On the contrary, it pointed out the treatment accorded the Robert

Leger Well No. 1 by the *Grigsby court*, 585 F.2d at 1069, and observed: "The recognition that 'rights to produce' can be created by unitization orders entered after 1972 is, of course, inconsistent with Pennzoil's argument that Section 212.72 froze 'property' boundaries as they existed in 1972." 514 F.Supp. at 518.

What Pennzoil contends, in essence, is that as to post-1972 unitizations the "aggregation" principle and other concepts of the Ruling were neither explicit nor essentially implicit in the definitional regulation; that the contemporary agency construction of that regulation furnished indications to the contrary on which it reasonably relied, or at least that informal contemporary agency opinion involved such conflicts or uncertainty as to warrant, or insulate from questioning by the agency, the actual pricing of Pennzoil's unitized production prior to the issuance of Ruling 1975-15; and that *Grigsby* far from being controlling to the contrary as the district court ruled, actually supports these views of Pennzoil.

II. *Regulatory Background*

In November 1973, when the Arab oil embargo had caused imported oil prices to rise sharply, Congress passed the Emergency Petroleum Allocation Act of 1973 (EPAA), Pub. L. No. 93-159, 87 Stat. 167 (codified at 15 U.S.C. §§ 751 *et seq.*). Regulations were to be promulgated under the EPAA within 15 days. A newly created Federal Energy Office (FEO) repromulgated the original Cost of Living Council (CLC) regulations with only minor changes, 10 C.F.R., Part 212, Subpart D, 39 Fed. Reg. 1952 (Jan. 15, 1974) where they remained until decontrol in 1981.[6]

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[6] The FEO was succeeded later in 1974 by the Federal Energy Administration (FEA) established pursuant to the Federal Energy Administration Act of 1974, Pub. L. No. 93-235, 88 Stat. 96 (codified at 15 U.S.C. §§ 761 *et seq.*), which agency continued to enforce the Mandatory Petroleum Price

A basic feature of the petroleum pricing regulations applied to domestic producers of crude oil was the "two-tier" pricing structure. 10 C.F.R. Part 212, Subpart D. The system was adopted to minimize the inflationary impact of worldwide oil prices and to provide an incentive for increased domestic production.[7]

When originally published in 1973 for public comment, the proposed regulations stated that amounts of old, new and released oil would have to be calculated for each "property" on which a producer of domestic crude oil "has leased" or "owns production rights." 38 Fed. Reg. 19182 (July 20, 1973). The term "property" was not then defined. Nine industry commenters specifically addressed the need for a definition. Most of these stated that a unit of oil leases would or should be a "property." None of the nine suggested that a unit should not be considered a separate property. No one suggested that only certain types of units, or only units formed before a certain date, should be considered single properties. Pennzoil presented to the trial court affidavits and copies of correspondence indicating that in the mental processes of various officials

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Regulations until DOE was established in 1977 pursuant to the Department of Energy Organization Act, 42 U.S.C. §§ 7101 *et seq.* On January 28, 1981, the President terminated petroleum price controls. Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

[7] Our statement of the regulatory background need not repeat many of the details set out in prior decisions, however significant. The validity and other aspects of the system are discussed in Cities Service Co. v. F.E.A., 529 F.2d 1016 (TECA 1975), *cert. denied*, 426 U.S. 927 (1976); Griffin v. United States, 537 F.2d 1130 (TECA), *cert. denied*, 429 U.S. 419 (1976); Pasco, Inc. v. Federal Energy Administration, 525 F.2d 1391 (TECA 1975); Consumers Union of U.S., Inc. v. Sawhill, 525 F.2d 1068 (TECA 1975); and Nader v. Sawhill, 514 F.2d 1064 (TECA 1975). Grigsby v. Department of Energy, *supra*, and Sauder v. Department of Energy, 648 F.2d 1341 (TECA 1981), relate more directly to the context in which the issues are now presented.

concerned with the evaluation of comments and the suggesting or drafting of proposed definitions ranging all the way from those which would designate "property" on a firm-wide basis to those suggesting that "properties" would be the separate fee or lease interests producing oil; from this Pennzoil argues that it was contemplated that there would be lease-by-lease comparisons despite unitizations.

We have sought in vain for any reliable pre-adoption guides to a meaning of the definition in question other than is implicit in it. Explorations, recollections of past mental processes, fragmentary notations and discussions out of context with the present issue, opinions emphasizing in different settings one or the other of the twin objectives of the two-tier system (the control of prices and the stimulation of production), and the memories of a few former officials or employees of the agency, now affiliated with oil companies, of what they had in mind as they considered the problems of definition years ago can be accorded little if any weight in appraising the product of countless participants.[8] Moreover, to dwell on these pre-

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[8] Documents "authored by agency staff or individual Commissioners 'cannot be considered as an official expression of the will and intent of the Commission.'" Securities & Exch. Comm'n v. National Student Mktg., 538 F.2d 404, 406-07 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977). "[W]e doubt" that an examination of staff memoranda "would give a very accurate picture" of the "ultimate decision" reached by the Commission. Sterling Drug Inc. v. F.T.C., 450 F.2d 698, 706 (D.C. Cir. 1971). The "interpretation given by an individual member of a Board or by its attorney is not, we think, to be taken as that official kind of interpretation to which courts must pay attention." Marine Engineers' Beneficial Ass'n No. 13 v. NLRB, 202 F.2d 546, 550 (3d Cir.), *cert. denied*, 346 U.S. 819 (1953). It is "absurd" to rely upon the unsupported opinions of agency staff attorneys when trying to divine the meaning of a regulation. Southern Goods Corp. v. Bowles, 158 F.2d 587, 590 (4th Cir. 1946). *Cf.* Montana Power Co. v. EPA, 608 F.2d 334, 353 n. 36 (9th Cir. 1979) (although a memorandum circulated among conference com-

regulation records or recollections would in a sense be anachronistic: most of those cited by Pennzoil were designed to explore the idea of lease-by-lease comparisons notwithstanding any unitizations, whenever occurring, a broad proposition from which even Pennzoil since has recoiled as we shall presently see, one which *Grigsby* since has concededly rejected, and one which has thus become even more clearly incompatible with the property definition itself, to which we now turn.

The CLC defined "property" as "the right which arises from a lease or from a fee interest to produce crude petroleum." 38 Fed. Reg. 22536, 22538 (Aug. 22, 1973) (formerly codified at 6 C.F.R. § 150.354(b)). That definition remained substantially unchanged until after the issuance of the ruling in question here.[9]

To determine amounts of old, new and released oil produced and sold from each property, the agency adopted the concept of a "base production control level" (BPCL).

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mittee members prior to passage of a bill "may be an accurate reflection of the senator's intent," it is "not probative of congressional intent," and therefore may not be considered in construing the statute). See text accompanying note 20 *infra*.

[9] In 1974, the last word, "petroleum," was changed to "oil." 39 Fed. Reg. 31622 (Aug. 31, 1974); 10 C.F.R. § 212.72. In February 1976, the definition was restructured to read: "the right to produce domestic crude oil which arises from a lease or from a fee interest." 41 Fed. Reg. 4940 (Feb. 3, 1976); 10 C.F.R. § 212.72.

In 1976, a provision was added to this property definition, effective September 1, 1976, to provide that

> [a] producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation.

41 Fed. Reg. 36172, 36184 (Aug. 26, 1976).

The BPCL was an historical figure—production during an earlier period of time—against which current production could be compared to determine the amounts of old, new and released oil. The BPCL was originally the amount of crude oil produced and sold during each corresponding month in 1972.[10]

On five occasions during 1974 and early 1975, the General Counsel of the Federal Energy Administration responded, pursuant to 10 C.F.R. §§ 205.80-.86, to requests from individual companies for formal agency Interpretations applying the "property"definition set forth in 10 C.F.R. § 212.72 in the context of a unitization.[11]

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[10] The 1972 monthly production and sales BPCL was in the original CLC regulations at 6 C.F.R. § 150.34(b) and was repromulgated by the FEO in 10 C.F.R. § 212.72. Both were complex but each set out a formula of treating crude oil production as "new oil" to the extent that it exceeded the 1972 level of production of the "property" from which it was produced. *See Grigsby*, 585 F.2d at 1073. On February 1, 1976, the regulations were amended to eliminate the "released" oil provision and to give producers the option of using either 1972 monthly production and sales or 1975 "old" oil production for computing the BPCL. *Compare* 39 Fed. Reg. 1952 (Jan. 15, 1974) *with* 41 Fed. Reg. 4939 (Feb. 3, 1976). In 1979, the regulations were amended still further to give producers their choice of three BPCL's—1972 monthly production and sales, 1975 "old" oil, or "old" oil produced and sold from October 1, 1978 through March 31, 1979. 44 Fed. Reg. 22010 (Apr. 12, 1979). While Pennzoil seeks to make some point of the post-1975 regulatory changes, especially as throwing adverse light upon the validity of the 1975 ruling in question here, we have concluded that the validity of the changes is not in question on this appeal and that such changes were consistent rather than inconsistent with the validity, as distinguished from the question of the policy, of such ruling and its regulatory basis.

[11] These five Interpretations (officially numbered 1975-2, 1975-4, 1975-10, 1975-27 and 1974-22) were later published at 42 Fed. Reg. 23723, 23726, 23730, 23740 and 25659 (May 10 and 18, 1977).

> " 'Interpretation' means a written statement issued by the General Counsel or his delegate or Regional Counsel,

On each occasion, the General Counsel indicated that a multi-lease unit would be treated as a single property for purposes of calculating production from a given "property."

In the February 14, 1975 Interpretation issued to Shell Oil Company, FEA's General Counsel explained, in response to a request concerning a unit formed after 1972, that "all of the production from the leases in existence in 1972, which now are part of the newly formed unit, must be taken into account in determining the base production control level of the newly formed unit." 42 Fed. Reg. 23726 (May 18, 1977). In applying the property concept no distinction was drawn between units formed during or before 1972 and those formed afterwards.

On August 29, 1975, the agency issued Ruling [12] 1975-15. 40 Fed. Reg. 40832 (Sept. 4, 1975). It is this ruling that Pennzoil seeks to have declared invalid as applied to the previous production of the Walker Creek Field Unit.

In the introduction to this ruling, FEA emphasized the operative words of Section 212.72:

> For purposes of the price regulations then, the property concept is one that identifies the *right to produce crude oil*, whether that right arises from a lease or from a fee interest . . . . [I]t is necessary that the price regulations embody a uniform concept, the parameters of which can be readily applied

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in response to a written request, that applies the regulations, rulings, and other precedents previously issued, to the particular facts of a prospective or completed act or transaction."

10 C.F.R. § 205.2.

[12] " 'Ruling' means an official interpretative statement of general applicability issued by the DOE General Counsel and published in the *Federal Register* that applies the DOE regulations to a specific set of circumstances." 10 C.F.R. § 215.2.

to all domestic production, regardless of varying state classifications.

. . . .

II. *Examples*

A. *Pre-1972 Unitization*—A property that was unitized prior to 1972 requires the same treatment as a single property that has been unchanged since 1972. Often, where two or more leases have reached the declining stages of production, they are unitized (*i.e.*, the operations of the several leases are combined, more efficiently to undertake enhanced recovery techniques.) Such techniques usually involve the conversion of some previously producing wells to injection wells and/or the shutting-in of other wells in a coordinated overall-production effort, and for this reason some leases are left after unitization with fewer producing wells within their geographical boundaries than before. Unitization sometimes results in one or more leases being left only with injection wells, or with no operating wells at all. Because this realignment of producing patterns, then, may result in the distorted *actual* production from any one lease comprising the unit, production from the unit is allocated to each lease based upon *imputed* production percentages . . . . Generally, therefore, since the unit agreement signifies one right to produce crude oil arising from several leases or fee interests, the unit defines the property.

. . . .

B. *Post-1972 Unitization*—In the case of a property that was unitized after calendar year 1972, the need for comparison of like quantities requires the producer in computing the BPCL to measure and total the individual 1972 monthly production levels for each of the leases that now comprise the unit. Accordingly, for example, where a unit consists of several leases that were unitized in 1973, the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that

now comprise the unit. Under no circumstances, therefore, would a post-1972 unitization create a "new" property, *i.e.*, one that has BPCL.[13]

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[13] As heretofore noted, the regulatory history following the issuance of Ruling 1975-15, contrary to the contentions of appellant, does not throw into question the validity of that ruling as concerned previous production from unitized leases. It was for the agency in the first instance, both in its rulemaking and in its rulings consistent therewith, to appropriately balance the objectives enumerated in the EPAA and particularly to weigh in specific contexts the competing considerations of the constraint of inflation and the encouragement of increased production. To pursue that history in further detail would needlessly encumber this opinion. It should be noted, however, that on December 22, 1975, the Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (codified in scattered sections of U.S.C.), was enacted expressly allowing the agency to permit increases in prices without current increases in production where the agency made findings that such increases would "give positive incentives for (i) enhanced recovery techniques." 15 U.S.C. § 757(b)(2)(A)-(C). Further agency investigation, comments and rulemaking culminated *inter alia* in regulations which created special provisions for units formed after the effective date of the regulations, including definitions of a unit and a unit BPCL, new rules concerning stripper well production and imputed new crude oil, and a provision that in the future the operators of units would not be required to implement a unit BPCL until there was a "significant alteration in production patterns." The agency explained in a preamble:

> Ruling 1975-15 is rescinded *ab initio* insofar as it requires producers of unitized properties to total all the BPCL's of the participating leases and to treat the unit as a single property, before such time as there has been a significant alteration in pre-unitized producing patterns of the individual leases. . . . Except as discussed above, Ruling 1975-15 is affirmed in all other respects.

41 Fed. Reg. 4937 (Feb. 3, 1976).

There is not now before us any issue concerning the application of this subsequent rulemaking and we refrain from expressing any opinion concerning it other than that it does not militate against our disposition of the issues presented to us on this appeal.

III. *Pennzoil's Operation of the Walker Creek Field Unit Following Operation of Its Earlier Tinsley Units*

At the time the two-tier pricing system was adopted in 1973, the Walker Creek Field had not been utilized. Each well had produced oil during 1972 and a BPCL thus had been established for each tract. Pursuant to CLC regulations, the operators of each tract certified its BPCL to the purchasers of crude oil from the field.

Prior to 1972 Pennzoil also operated a number of units each composed of several crude oil leases in the Tinsley Field in the State of Mississippi. The company calculated a single unit BPCL for each Tinsley unit by totaling the production and sales from the constitutent leases, thus treating the respective units as single properties within the contemplation of the price regulation. In January 1974, a Pennzoil official suggested a plan for increasing profits, despite declining production from the Tinsley units, by changing the method of calculating the BPCL's from a unit basis to a lease-by-lease basis. In an interoffice memorandum dated January 24, 1974, B.C. Sinclair, a petroleum engineer serving as Pennzoil's representative on the unit operator's committee and its chairman, stated:

> As Tom Dunn discussed with you, the position has been taken that for the purpose of determining if "new oil" has been produced from our waterflood projects in Tinsley, each field-wide unit is considered a "property" as the term "property" is defined by the Cost of Living Council price regulations. Since all of our waterfloods reached a peak production, when considered in total, prior to September, 1973, we have claimed no "new oil" from these projects.
>
> The CLC defines a "property" as follows—"Property is the right which arises from a lease or from a fee interest to produce domestic crude petroleum."

> Since the fieldwide units are the result of pooling many leases by several operators, it is my opinion that each lease could be considered a "property" in these fieldwide units. If we can so interpret the rules, we will be able to collect the "new oil" price on a significant volume of oil for the months of September thru December of 1973 and also in the future.
>
> . . . .
>
> Please check this with our attorneys and give us their ruling.

Memorandum from B.C. Sinclair to E.C. Shivers, Def. Ex. 25.

In another intra-company memorandum dated July 31, 1974, on the subject "Determination of 'New' Oil under Federal Energy Administration Mandatory Price Regulations for Walker Creek Unit," a Pennzoil official indicated that a decision on how to treat the Tinsley units would turn on the decision of how to treat the Walker Creek Unit. "If this all works out satisfactorily for Walker Creek we will try to get Jack Ohrt's OK to handle Tinsley in a similar manner." Def. Ex. 29.

The Walker Creek Unit was formally establishted effective May 1, 1974, with the approval of the State of Arkansas after the interest owners in 39 oil producing tracts agreed to combine their rights to produce so as "to increase the ultimate recovery" of oil from the field. Pennzoil, a thirteen percent working interest owner in the unit, became its sole operator. The decision to unitize the varicus leases had been made in December 1971, before oil prices had escalated to the point at which the CLC promulgated the petroleum price regulations. The final study concerning the Walker Creek unitization had been prepared by July 1973, again before the regulations were promulgated, and reflected that, with unitization, net profits would increase by $40.657 million because of the large amount of extra oil that could be

extracted from the field even after taking into consideration the additional capital investment of $1.85 million associated with the enhanced recovery operations which were necessary to extend the producing life of the field. The projected increase in net profits over the lifetime of the unit was based on an anticipated price of $4.20 for each extra barrel of oil sold, which was less than the price of old oil at the time of unitization.

The Walker Creek Unit Agreement provided that "[a]ll Oil and Gas Rights . . . are hereby unitized . . . so that Unit Operations may be conducted with respect to the Unitized Formation as if the Unit Area had been included in a single lease." Each royalty and working interest owner was to receive his "fair share" of the unit's overall production, not the actual oil produced from his pre-unit tract.[14]

Immediately after the Walker Creek Unit was formed, at least 13 tracts—that is ⅓ of the unit's 39 tracts—were shut in while production from others was increased. Total monthly production from the unit was less, however, than had been the total monthly production from the 39 tracts prior to unitization. Had it calculated a unit BPCL upon unitization, the Walker Creek Unit would have produced only "old" oil, although total production over the life of the field would have increased. By treating each tract as a separate property with a separate BPCL and transferring production from some tracts to others, Pennzoil was able to create substantial

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[14] Specifically, the Unit Agreement provided that:

> All Unitized Substances produced and saved . . . shall be allocated to the several Tracts in accordance with the respective Tract Participations effective during the period that the Unitized Substances . . . were produced. The amount of Unitized Substances allocated to each Tract, regardless of whether the amount is more or less than the actual production of Unitized Substances from the well or wells, if any, on such Tract, shall be deemed for all purposes to have been produced from such Tract.

volumes of "new" and "released" oil in the face of falling total monthly production.

In pricing the oil produced from the Walker Creek Unit during May 1974, the first month of unit production, Pennzoil, while not calculating a unit BPCL as it did for its Tinsley Units, attributed to the interest owners in each Walker Creek tract their "fair share" of the unit's production by comparing their collective imputed share of the unit's production as a whole with each tract's 1972 BPCL to establish amounts of old, new and released oil.

On June 14, 1974, Pennzoil wrote a letter to Cities Service Oil Company regarding pricing of oil from the Walker Creek Unit:

> Please accept this letter as confirmation of our recent verbal request that you suspend bonus payments for oil purchased from the referenced unit until a determination can be made of the correct manner in which to calculate "new" and "released" oil.
>
> We expect a ruling from the Federal Energy Office in the reasonably near future, and request that until further advice from us all payments be made at the applicable ceiling price, which is presently $5.20 per barrel.

Def. Ex. 33. No such ruling was ever requested or received by Pennzoil pursuant to 10 C.F.R. §§ 205.80-.86.

Pennzoil claims that before the unitization of the Walker Creek Field it had "guidance from FEO officials in Houston, Texas, regarding the proper method of pricing crude oil from the Field after unitization." The basis of this assertion is noted to be an intra-company memorandum which is dated April 18, 1974, reporting that an unidentified agency informant had advised a representative of the company that after post-1972 unitization "[a]ll certification as to New and Released Oil for wells which were producing from a lease will con-

tinue to be certified for that lease after unitization," but that "[a]ll production from units established prior to September, 1973 will have to be certified relative to the total production from that unit, rather than the lease upon which the wells were originally drilled." Pltf. Ex. 70.

Not long after the establishment of the Walker Creek Field Unit, a Washington, D.C. attorney wrote to a lawyer for Pennzoil:

> This letter summarizes our conversation regarding those sections of the Mandatory Petroleum Price Regulations applicable to Producers of Crude Petroleum.
>
> . . . .
>
> On June 27, 1974 we spoke by telephone regarding the application of these provisions to the Walker Creek (Arkansas) Field. You explained that this field was unitized pursuant to an agreement which became effective May 1, 1974. Although the aggregate volume of production from this field may not have been materially changed with unitization, some wells have been shut in and production from other wells has been increased.
>
> You asked whether the production increase over the May 15, 1973 volumes from those wells which had their capacity expanded was "new crude production" within the meaning of the Regulations.
>
> After our initial conversation I spoke with James Langdon, Esquire, Director of the Office of Regulatory Review of the Federal Energy Office, about the unitized field situation . . . . He expressed the view that the appropriate method for determining what is "old" and what is "new" crude in a situation such as this is to compare the actual production from a given well or lease to the "base period" production of such well or lease. He explained that any increase over the "base period" production of such well or lease is "new" crude, provided that the unitization

> agreement does not collapse existing leases or property lines. He stated that our situation is not unique and that field unitization appears to create a "loophole" in the Regulations. He stated that this problem had been raised previously and is currently under consideration by the General Counsel's Office,[15] but he did not know of any imm[i]nent move to revise the Regulations or issue an interpretation that would alter his informal judgment.
>
> At your request I am sending copies of this letter, for informational purposes only, to the lawyers for the Pennzoil Producing Company....

Letter from Attorney Weidenfeld to Attorney Hardwick of Tulsa, Oklahoma, dated July 12, 1974, Pltf. Ex. 71.

On July 23, 1974, Mr. Sinclair, who as we have seen had already suggested a plan for increasing the Tinsley Unit "new" oil in spite of decreasing monthly unit production, wrote in support of a similar but more pointed scheme for increasing Walker Creek Unit profits:

> Since it appears that certification of new and released oil for the Walker Creek Unit will be on the basis of actual rather than allocated well production, an attempt should be made to produce only new and released oil. This will mean, for the most part, that production rates for most of the wells will have to be increased to in excess of 640 barrels per day.
>
> . . . .
>
> Production at high rates does not appear to present a gas balancing problem; however, tankage availability is definitely a problem. Considering the additional income to be generated by producing only new

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[15] The knowledge of Pennzoil at this time "that this problem had been raised previously" and was then "under consideration by the General Counsel's Office" seems both an invitation to seek advice from that source on its own particular problem and a warning that if it did not do so it was proceeding at its own peril.

> and released oil, tanks from some of the shut-in wells could be temporarily moved to the high volume wells.

Interoffice memorandum from James A. Crews to B.C. Sinclair, DOE Br., Addendum 4; *see also* Pennzoil's Reply Br., Addendum at A-3 to A-4.

From August 1974 until Ruling 1975-15 was issued in August, 1975, Pennzoil certified the Walker Creek oil by comparing actual production from each tract against that tract's separate BPCL. Beginning in September, 1975, because of Ruling 1975-15, Pennzoil calculated amounts of old, new and released oil from Walker Creek by using a unit BPCL.

At the present time Pennzoil concedes that the aggregation principle controls at least pre-1972 units, as indeed it must in view of the wording of the definition, and *Grigsby*. The validity of its present position depends upon differentiating the application of the unit concept to units created after 1972. Its initial attack upon the Ruling before the agency, as well as its original position in the district court, was against the "unit as property" concept as a whole. Thus in an "Application for Rescission of Ruling 1975-15 or for Proposed Rulemaking" submitted to the agency by Pennzoil's vice-president and general attorney under date of November 14, 1975, it was stated:

> Pennzoil submits that treating each lease or tract separately as a "property" is consistent with the current regulations and furthers the basic goals of the Emergency Petroleum Allocation Act. The present ruling serves as a significant deterrent to the formation of new units and threatens the economic existence of present units which have been maintained on the expectation that some portion of their production would qualify for new oil prices. Since Ruling 1975-15 is an illegally adopted amendment to the regulations and represents an ill-conceived policy as well, Pennzoil requests that it be revoked.

R. 2282.

Pennzoil concluded in summary that the FEA should implement one of the following approaches which it listed in the order of its preference:

> 1. Rescind Ruling 1975-15 and treat each tract or lease within a unit created for enhanced recovery as a separate and distinct "property" for purposes of computing the BPCL as presently required by the regulations.
>
> 2. Adopt by rulemaking a new policy which (a) treats all units created for enhanced recovery as "new" properties, or (b) eliminates the year 1972 as the base year for computing the BPCL and substitutes the period which immediately precedes the date operations for enhanced recovery commence.

R. 2285-86.

On May 2, 1978 this court decided *Grigsby*.

IV. *The Principle of Ruling 1975-15 Is Implicit in the Property Definition*

No one has claimed that there was any flaw in the rulemaking encompassing the property definition nor that if the principle of Ruling 1975-15 had been explicitly set out in that rulemaking Pennzoil's contentions here would not have to be rejected, wholly apart from any controlling effect of our decision in *Grigsby*.[16]

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[16] Mr. Mathis (for Pennzoil): So our primary contention is that Ruling 75-15 is a legislative-type a [sic] change in the regulations and, therefore, should have been proceeded [sic] by notice and opportunity to comment as required by the Administrative Procedure Act.

The Court: All right.

Mr. Mathis: The second—

The Court: Before you go on to the second, what you challenge about 75-15 is the requirement that there be an aggregation.

Mr. Mathis: Yes, sir.

The Court: You did not challenge the authority of the Agency if they have power to say there has to be an

The most significant institutional interpretations bearing on the issues of this case are, of course, the preruling official Interpretations by the General Counsel of the agency heretofore referred to, Ruling 1975-15, and the definitional regulation itself, which officially spoke for the agency from the beginning.

The statement of the definition that "property means the right which arises from a lease or fee interest to produce crude petroleum" is obviously quite different in meaning than if the regulation had provided that "property means a lease or fee interest producing crude oil." As *Grigsby* points out, "[t]he focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." 585 F.2d at 1083.

The application of this definition to unitized properties plainly contemplates a single "property" or right to produce arising from the several leases or fee interests constituting the unit. The very concept of unitization in general, and the express terms of the unit agreement covering the Walker Creek Field in particular are in accord.

To support Pennzoil's present contention would require a revision of the definition to read essentially: " 'Property' means the right to produce domestic crude oil which arises from a lease or from a fee interest unless a lease or fee interest which had production in 1972 is included in an enhanced recovery unit after 1972, in which latter event each individual lease is the 'property' for the purposes both of determining BPCL's and measuring current production." Yet if upon unitization the

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aggregation. You don't challenge their authority to say [later] you don't have to aggregate until you have a significant alteration of production pattern.

Mr. Mathis: We do not; that is correct.

R. 0087-88.

"property" is no longer defined by each individual lease but by the unit as a single right to produce, it seems rather obvious that current production of the "property" after unitization must include all production from all of the leases within the unit.

But Pennzoil protests that if this is done for post-1972 unitizations, there will have been no corresponding unit in 1972 whose base production could be compared with current production. Its solution is to pretend for pricing purposes that there has been no unitization into a single right to produce so that current production can continue to be compared lease by lease with 1972 production. We do not think it makes sense either to thus suppose the existence in 1972 of a unit which did not then exist, or to pretend that there did not exist in a later year a unit which then did exist. We believe that the concept of the property definition in the context of the case now presented to us requires production of the unit as a whole as it existed in the current year of measurement to be compared with the combined BPCL's of the leases comprising that unit as they existed in 1972 prior to unitization.

The case before us involves a regulation doing much more than "pointing in the direction"[17] of the interpretation later issued by the administrative agency. Inherent in that regulation was the property concept, thus furnishing a meaningful guide for applying the definition to the unit in question, whatever may be thought of its application in other contexts. We are not here concerned with post-1975 alterations of production patterns, production from different reservoirs on the same lease, post-1972 subdivisions, farmout agreements or the treatment of reservoir-wide production units under rulings after 1975, to which attention has been diverted in the arguments. Time enough for us to

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[17] *Cf.* State of La. v. Department of Energy, 507 F.Supp. 1365, 1376 (W.D. La. 1981).

address these different problems in their own contexts if and when they are presented to this court.[18]

The two-tier pricing system was designed to effectively minimize the inflationary impact of rising worldwide oil prices and provide necessary incentives for increased domestic production. *Cities Service*, 529 F.2d at 1020. Pennzoil's reading of the definition would disregard the agency's primary responsibility of balancing objectives and ignore its duty to reasonably inhibit gerrymandering of boundaries undertaken to avoid price controls. The views of CLC officials cited by the company in support of its own construction that the enhancement of production had to be the dominant objective can alter neither the plain language of the definition nor its application to Pennzoil's present operation as determined by the agency entrusted by Congress to balance multiple objectives in the administration of relevant statutes.

But because of Pennzoil's earnest insistence upon its own ideas as to the primacy of objectives, and its rather cavalier rejection of the agency's interpretations in misplaced reliance upon our decision in *Standard Oil*, it may be helpful to recapitulate the basic rules affecting the weight to be accorded to administrative interpretation before we address the determinative differences between the situation in *Standard Oil* and the present case.

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[18] *See* Bowles v. Seminole Rock Co., 325 U.S. 410, 418 (1945), dealing with a situation where there allegedly had been an inconsistent administrative interpretation of an amended regulation and in which the Court was not dissuaded from following the challenged interpretation. The Supreme Court stated that other matters "are not in issue in this case and statements interpreting that amendment have no bearing here. The Court added: "The administrator's explanation of the amendments, which are not presently before us, is likewise irrelevant in this case."

In *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945), the Supreme Court stated that in interpreting an

> administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

We have stated that "[i]nterpretative rules . . . are not binding on the courts," whereas a "legislative rule has the force of law." *Energy Consumers, Etc. v. Dept. of Energy*, 632 F.2d 129, 140 (TECA), *cert. denied*, 449 U.S. 832 (1980); *Standard Oil*, 596 F.2d at 1061.

As Professor Davis has observed:

> When a rule is issued pursuant to delegated power, the court is bound by it as if it were a statute, and the court can do no more than inquire into its validity. But when a rule is not issued pursuant to delegated power, the court's inquiry is not into validity but is into correctness or propriety. . . .

2 *Davis, Administrative Law Treatise* § 7:13, at 59 (2d ed. 1979) [hereinafter cited as *Davis*].

> When an agency has power to make a legislative rule, a rule it issues may still be an interpretative rule if it so intends, and courts do the best they can to discover the intent. When a rule purports to change the law, it cannot be merely interpretative.

Id. § 7:8, at 42-43.

Professor Davis distinguishes between legislative rules and interpretative rules as follows:

> The crucial difference between the interpretative rules dealt with in the Skidmore case [Skidmore v. Swift & Co., 323 U.S. 134 (1944)] and the legislative rules dealt with in the A.T. & T. case [American Telephone & Telegraph Co. v. United States, 299 U.S. 232 (1936)] is that the ultimate power to determine the content of the law covered by the rules was in the courts in the Skidmore case and in the FCC in the A.T. & T. case. And the reason for the result in each instance was that Congress withheld general lawmaking power from the Administrator in the Fair Labor Standards Act but granted the lawmaking power to the FCC in the Communications Act.

Davis, § 7:10, at 51-52.

In *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), the Supreme Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n* v. *Aragon*, 329 U.S. 143, 153. See also, *e.g.*, *Gray* v. *Powell*, 314 U.S. 402; *Universal Battery Co.* v. *United States*, 281 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408. When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

Earlier, in *Skidmore*, 323 U.S. at 140, the Supreme Court had declared that the deference accorded an inter-

pretative rule in a given case "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." [19]

In the administration of the statute involved in *Skidmore*, "Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts." *Skidmore*, 323 U.S. at 137, citing *Kirschbaum Co. v. Walling*, 316 U.S. 517, 523 (1942). The Supreme Court has demonstrated a willingness to grant more deference in situations similar to that involving the DOE under the ESA and the EPAA where Congress established the agency as a regulator and interpreter in the first instance rather than "[putting] upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." *Kirschbaum*, 316 U.S. at 523.

By reason of our determination that the controlling concept of Ruling 1975-15 was implicit in the regulatory definition of "property," we need not here decide the extent of the special deference to be afforded the interpretation in view of the distinction thus drawn by the Supreme Court and noted by Professor Davis; we would sustain that interpretation on the basis of the criteria for deference outlined in *Skidmore*. Yet the broad agency authority with which we are concerned in the present case lends further support to our conclusion.

With further reference to Pennzoil's reliance upon informal advice as a diminishment of deference to be

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[19] *See Standard Oil*, 596 F.2d at 1056, stating the *Skidmore* rule but where a distinction based upon the varying powers of agencies was not critical in view of the circumstances heretofore referred to.

accorded to the agency's ruling, it is worth remembering that opinions are to be given little weight, as such, unless they are institutional in character. Thus in *Mobil Oil Corp. v. Tully*, 653 F.2d 497, 501-02 (TECA 1981), *vacated on other grounds*, 50 U.S.L.W. 3661 (1982), this court held that an informal letter not constituting an official agency interpretation "is of little value." *Cf. McCulloch Gas Processing v. Dept. of Energy*, 650 F.2d 1216, 1229 (TECA 1981). Although the recent case of *United States v. LaSalle National Bank*, 437 U.S. 298, 313-17 (1978), was in different context, it is instructive to note the similar distinction there drawn between institutional action and employee comments and opinions.[20]

Before the promulgation of Ruling 1975-15, the Office of the General Counsel issued five Interpretations of the definition. Each treated a multi-lease unit in harmony with the "single-property"[21] concept, and at least one rejected a different concept with reference to a post-1972 unitization.

The only official statements cited by Pennzoil which may be said to throw question upon this concept are two Federal Energy Regulatory Commission (FERC) exception decisions issued prior to Ruling 1975-15.[22] It is

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[20] See cases cited in note 8 *supra*.

[21] See note 11 *supra* and accompanying text. Pennzoil suggests that these interpretations should be ignored because they were not published in the Federal Register until March 1977.

The fact is that these five Interpretations, issued to different companies prior to the issuance of Ruling 1975-15, belie Pennzoil's argument that Ruling 1975-15 was the first time the agency ever announced an institutional position that a unit is a property.

[22] Sun Oil Co., 2 FEA ¶ 83,075 (Mar. 21, 1975), and Empire Drilling Co., 2 FEA ¶ 83,142 (May 9, 1975), *aff'd*, 2 FEA ¶ 80,676 (Sept. 2, 1975). Pennzoil also points to the Secretary of Energy's brief filed with FERC in support of a remedial order then under review in North American Production Co., Energy Mgt. (CCH) ¶ 46,080 (July 18, 1980). Pennzoil Br. at 20 n.60. It seems likely that Pennzoil's refer-

obvious in view of the dates of these decisions that they could have had no influence upon the plan to unitize the Walker Creek leases nor upon the unit's pricing practices. The purpose of an exception decision is to decide whether an applicant should be relieved, because of some "serious hardship or gross inequity," from a duty which it believes otherwise would be required by a regulation. *See* 42 U.S.C. § 7194; 10 C.F.R. §§ 205.50 *et seq.* Consequently, the agency's primary responsibility in exception proceedings is to determine whether a producer should be allowed to do what a regulation may preclude. Pennzoil, moreover, ignores three other exception decisions issued between 1974 and the time of the Ruling and all having "single-property" language unfavorable to its position.[23] A careful reading of even the two exception decisions relied on by Pennzoil affords little comfort to its view in the context of the present problem.[24] Nor has Pennzoil pointed to any interpreta-

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ences to that brief are taken out of context. That case concerned only the part of the Ruling concerning subdivision of leases, which is not in issue here. Nonetheless, FERC, which is the last step in the DOE review process for remedial orders, rejected the Secretary's position in that case and reaffirmed the central focus of the property definition on the "right to produce." Exxon and other amici point to a statement concerning "vagueness" of the property definition made by FEA Deputy Administrator John A. Hill before a committee of Congress in November 1976. There is no indication that this statement had reference to the application of the property concept to the uncomplicated problem of the Walker Creek Unit. In any event, such statements carry little weight. *See* United States v. Stewart, 311 U.S. 60, 70 n.22 (1940).

[23] In these three pre-Ruling 1975-15 exception decisions, the agency assumed, along with the producers in those cases, that a unit was a single property. Pruet & Hughes Co., 2 FEA ¶ 83,270 (Aug. 25, 1975); D.L. Withington, 2 FEA ¶ 83,079 (Mar. 26, 1975), *aff'd*, 2 FEA ¶ 80,608 (June 13, 1975); M.J. Mitchell, 1 FEA ¶ 20,611 (June 3, 1974).

[24] Both Applications for Exception involved post-1972 unitizations of properties that had been producing as separate

tion or other official document generated during the relevant period between the adoption of the property definition and the issuance of the Ruling which supports the differentiation it now relies upon—that this property

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entities in 1972. Sun Oil Company based its exception request on the assertion "that the impact of continued price controls will reduce the amount of oil it will be economically feasible to ultimately recover from the field." In reaching the decision to deny this request, the FEA "concluded" that

> [s]ince crude oil was produced and sold from 75 different properties in the Norge-Marchand Field in 1972, current crude oil production and sales from any given property must exceed the production from that property in the corresponding month of 1972 (plus any accumulated deficiency) before it can be sold at exempt prices. While the unit operation of the Field will significantly increase the crude oil yield over the life of the Field, the crude oil production in 1975 of each of the properties computed on an individual basis is not expected to exceed 1972 levels and consequently all of the crude oil produced from the 75 properties composing the Norge-Marchand Unit will be subject to FEA ceiling price controls.

No individual "properties" had produced more oil in 1975 than in 1972 and hence under any interpretation of the property definition there would have been no "new" oil in the absence of exception relief.

Although the initial statement by FEA might, in the abstract, tend to support Pennzoil's position in this case we note that this particular "conclusion" was stated more in the form of an initial premise than a holding. Indeed it will be observed that in arriving at its decision, the agency focused on the fact that

> . . . [u]nder the Petroleum Allocation and Price Regulations, an exception may be granted to prevent or alleviate a serious hardship or gross inequity. However, Sun has not even alleged that it or the owners of the Unit will experience a serious hardship or gross inequity in the immediate or near future if its exception request is not granted. . . . Although it may eventually become uneconomic to continue production from the Unit because of ceiling price controls on the sale of such crude oil, that

concept did not apply to units created after 1972. And the affidavits of its advisors were based largely on now discredited ideas that the single property concept did not apply to the unitization of leases at all.

V. *On the Points at Issue There Has Been No "Uncertainty" or "Confusion" To Invoke the Standard Oil Doctrine in Negation of Deference to the Agency Interpretation*

Pennzoil and some of the amici curiae contend that *Standard Oil* demonstrates that Ruling 1975-15 cannot be given retroactive effect in view of the "confusion and uncertainty" of the administrative interpretation which,

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possibility does not constitute a basis for granting exception relief at the present time.

In *Empire*, one of the agency "conclusions" contains language more hospitable to Pennzoil's contentions, but again as in *Sun*, the agency did not rely on that premise in reaching its ultimate decision that "Empire has failed to establish that the application to it of the requirements set forth in 10 C.F.R., Part 212, Subpart D, results in a serious hardship or gross inequity."

On the appeal filed with the Office of Exceptions and Appeals, Empire disputed the determination that it had "failed to demonstrate that its factual situation was so different from that of other firms which had begun secondary recovery operations since 1972 as to warrant an exception from the FEA Mandatory Petroleum Pricing Regulations." The FEA affirmed the earlier decision, again concluding that Empire had failed to make the requisite showing of serious hardship or gross inequity. The agency neither referred to nor relied upon the language tending to support Pennzoil's contentions, thus lending credence to our conclusion that this language did not represent a "holding" of the agency but only a premise not ultimately necessary to the agency decision. The determinative factors of the *Sun* and *Empire* decisions are irrelevant here. *See* Massey Motors v. United States, 364 U.S. 92 (1960), and discussion thereof in text accompanying note 34 *infra*.

even though it was a reasonable alternative, was not a "compelled" construction.[25]

Standard Oil is a frequently cited and highly significant decision in the context of its particular circumstances. Where, as on points at issue there, an agency by legislative rulemaking has established no regulatory lodestar and its institutional compass has pointed in opposite or shifting directions, the rule of deference will not sustain the retroactive application of an interpretation of which an affected interest had no fair notice.

However, not only would Pennzoil have us disregard the determinative differences between the circumstances of *Standard Oil* and the case at bar but, as if this were not enough, especially the amici would conjure up from that decision a doctrine of "compelled construction" to replace the rules laid down by the Supreme Court for retroactive applications[26] by the notion that, aside from other circumstances if there are two reasonable interpretations of a regulation, only the alternative selected by the regulated entity, and not the one selected by the agency, may be given retroactive effect by the courts.[27]

The adoption of any such idea on the theory that *Standard Oil* approved it would not only misread that

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[25] The contention that even though an interpretation is reasonable it cannot be applied "retroactively" unless "compelled" was urged in Pennzoil's arguments below but has not been reiterated expressly here except by inference or by way of reference. Several of the amici curiae strongly urge it in their briefs filed here.

[26] *See, e.g.*, Securities Comm'n v. Chenery Corp., 332 U.S. 194, 203 (1947), and later discussion herein concerning retroactivity.

[27] There of course is a related principle which is respected and sound: if an administrative interpretation is contrary to the plain meaning of the regulation it purports to interpret, the interpretation is not to be retroactively applied, if applied at all. *See, e.g.*, Tenneco Oil Co. v. Federal Energy Administration, 613 F.2d 298 (TECA 1979).

case but disrupt essential accepted agency functions in favor of self-serving choices of the regulated. Unlike the situation in *Standard Oil*,[28] here there was a regulation in which the very interpretation in dispute was implicit. Far from there being institutional uncertainty and conflict, there existed in official rulings almost a bright line of agency explanation, tentative only on collateral issues but relatively clear and steadfast upon the particular principle in this case.

The legitimacy of the "compelled construction" theory is even less clear than its antecedents. In *State of La. v. Department of Energy*, 507 F.Supp. 1365, 1376 (W.D. La. 1981), the district court ascribed a "compelled construction" doctrine to our decision in *Standard Oil* and to *Standard Oil Co. v. Federal Energy Administration*, 453 F.Supp. 203 (N.D. Ohio 1978), and *Phillips Pet. Co. v. Department of Energy*, 449 F.Supp. 760 (D. Del. 1978), the two district court decisions reviewed by us in *Standard Oil*.

> The cases are clear that a *post hoc* agency interpretation of an ambiguous regulation should not be enforced retroactively against a regulated party who adopted and applied an alternate reasonable interpretation of the regulation during the period between the initial promulgation of the ambiguous regulation and the later agency interpretation.

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[28] [I]t is undisputed that during the relevant period the only public pronouncements were made by officials of the Office of Compliance and the FEA auditors and were contrary to the interpretation set forth in the February 1, 1976 rule.

596 F.2d at 1056.

Here the relevant period was between May 1, 1974, when the Walker Creek Field unitization became effective, and August 29, 1975, when the ruling in question was issued. We have already reviewed the situation during this period in contrast with the situation in *Standard Oil*.

State of La., 507 F.Supp. at 1376. While it is true that both district court decisions on review in *Standard Oil* disallowed retroactive application of the agency interpretation there in question, and that the *Phillips* court concluded that the regulations did not "compel" that agency interpretation, we find no formulation of a "compelled construction" doctrine in either case. *Standard Oil*, 453 F.Supp. at 238-41; *Phillips*, 449 F.Supp. at 780-83, 797-98.

In *Standard Oil*, 596 F.2d at 1052, we observed that the overturned interpretation of the agency "was not compelled."[29] Under circumstances of *Standard Oil* already referred to, this observation was given weight in reaching our conclusion that the interpretation would not be retroactively applied. But a clear indication that such observation was not intended as a discrete rule for the exclusion of retroactive application appears from the fact that we there considered the retroactivity issue at some length separately and upon the basis of the generally accepted tests.[30] Based upon a misconception of

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[29] There was confusion and uncertainty among both FEA officials and the refiners. While the regulations could reasonably be interpreted as imposing a NPCI Last sequence of recovery, in our opinion this interpretation was not compelled. The regulations could also reasonably have been construed as imposing no particular sequence of recovery.

Standard Oil, 596 F.2d at 1052.

On three recent occasions, this court has found it necessary to emphasize the limited reach of *Standard Oil* given the unique circumstances of that case. *See Sauder*, 648 F.2d at 1346, (emphasizing that this court did not invalidate the agency's interpretation in *Standard Oil* simply because the underlying regulatory scheme could be construed in more than one way); *UPG*, 647 F.2d at 157 nn.24 & 26; Mountain Fuel Supply Co. v. DOE, 656 F.2d 690 (TECA 1981).

[30] 596 F.2d at 1063-65 (discussing the retroactivity tests of Securities Comm'n v. Chenery Corp., 332 U.S. 194, 203 (1947), and Retail, Wholesale and Department Store U. v.

those observations for which Pennzoil now contends, the district court in *State of La.*, 507 F.Supp. at 1376, parlayed our passing observations in *Standard Oil* into a cardinal and conclusive retroactive application test. A similar misconception has been relied upon by Pennzoil on the basis of some of our other decisions.[31] As to these, a later decision[32] makes clear that *Standard Oil* was an unusual case and was not intended in the context of such a case as the present one to overturn the usual rules of deference to which agency action is entitled from the courts or the relation back of post-regulation interpretations.[33]

In these circumstances, to deny deference in accepting the agency's interpretation simply because another interpretation, strained or not, was indulged by an operator out of self-interest, would substitute for the rule of deference to agency action a rule of deference to that of a producer. This would stand the rule of deference literally on its head.

In *Sauder*, 648 F.2d at 1346-47, Sauder had argued "that this court rejects agency interpretations of preexisting regulations where these interpretations are not 'compelled' by the regulations." Judge Duniway perceptively observed that

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N.L.R.B., 466 F.2d 380, 390 (D.C. Cir. 1972)). *See also Phillips*, 449 F.Supp. at 797-98 (applying the same traditional tests rather than basing its decision on any "compelled construction" doctrine). See our discussion *infra* of retroactivity.

[31] Tenneco Oil Co. v. Federal Energy Administration, 613 F.2d 298 (TECA 1979); Longview Refining Co. v. Shore, 554 F.2d 1006 (TECA), *cert. denied*, 434 U.S. 836 (1977).

[32] *UPG*, 647 F.2d at 157.

[33] "Interpretative rules simply state what the statute or regulation has always meant in the opinion of the administrative agency issuing the interpretative rule." Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082, 1100 (TECA 1978).

> [N]either of the cases he relies upon supports this questionable proposition. In *Standard Oil Co. v. DOE*, Em.App., 1978, 596 F.2d 1029, 1052, we found that FEA's interpretation of its regulations as requiring a certain sequence of cost pass-through was reasonable but "was not compelled. The regulations could also reasonably have been construed as imposing no particular sequence of recovery." However, we did not conclude from this fact that the agency's interpretation of the regulations was necessarily invalid. Rather, we concluded only that the validity of the agency's interpretation must be judged separately from the validity of the underlying regulations. Were Sauder correct, the majority opinion would have ended at page 1052 instead of nearly twenty pages later. Moreover, in refusing to defer to the agency's last interpretation of its regulations, we emphasized in *Standard Oil* the extraordinarily confused and contradictory agency interpretations which had preceded it. There is no comparable history of agency confusion in the case at bar.
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> Similarly, in *Tenneco Oil Co. v. FEA*, Em.App., 1979, 613 F.2d 298, we refuse [sic] to defer to the agency's interpretation of its regulations, not because the agency's interpretation was merely "reasonable" and "not compelled," but because the agency sought to impose an interpretation "plainly inconsistent with the language of the regulations." *Id.* at 305. In short, the agency's interpretation of the scope of the stripper well exemption and the property concept need not be "compelled" by the regulations in order for us to uphold it. Nor do we see reason on the facts of the case to abandon the normal rule of deference to an agency's reasonable interpretation of its own regulations.

One of the difficulties of analyzing this case has been that in briefs and argument several separate questions have been merged: whether the ruling is interpretative or legislative; the meaning of the regulatory definition; the *Grigsby* holding; the necessity of rulemaking; and

the appropriateness of retroactive application. It is essential that we now consider particularly the question of retroactive application as a discrete although related problem.

In view of our conclusions that the critical meaning of the regulatory definition as applied to the issues of this case is implicit in the Ruling, and that the substance of the Ruling (irrespective of the degree of deference applied to the Ruling) represents the correct construction of the regulation, the remaining question is whether the Ruling either as such, or in substance, is entitled to be applied retroactively during the relevant period.

In *Standard Oil*, this court outlined the test for determining the propriety of retroactive application of an agency rule:

> We are mindful of the holding of the Supreme Court in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1581, 91 L.Ed. 1995 (1947), that agency action "might have a retroactive effect [is] not necessarily fatal to its validity. Every case of first impression has a retroactive effect. . . ." The validity of the agency action depends upon the "balance" between the "mischief of producing a result which is contrary to a statutory design or to legal and equitable principles" and "the ill effect of the retroactive application of a new standard". *Id.* As the court noted in *Retail, Wholesale and Department Store Union* v. *NLRB*, 151 U.S.App.D.C. 209, 219, 466 F.2d 389, 390 (1972), "[w]hich side of this balance preponderates is in each case a question of law, resolvable by reviewing courts with no overriding obligation of deference to the agency decision . . ." The court concluded that among the factors to be considered are "(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an

> unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard". *Id.*

596 F.2d at 1063-64.

In the present context, the fundamental criterion is one of reasonableness. "[R]etrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of [the Constitution]." *Satterlee v. Matthewson*, 27 U.S. 380, 413 (1829). Generally speaking, like retroactive statutes, "retroactive rules are valid if they are reasonable, but are invalid if their retroactivity is unreasonable in the circumstances." *Davis*, § 7:23, at 109. Pursuing the subject, Professor Davis observed that:

> Especially instructive is the decision by a divided Court in Massey Motors v. United States, 364 U.S. 92 (1960), allowing Treasury Regulations to produce retroactive clarification of uncertain law, and, in the view of dissenting Justices, to produce retroactive change in a discernible administrative practice. If the Court was right that the previous law was unclear, the basic principle was applicable that retroactive clarification of uncertain law is necessary and involves no unfairness. . . ."

Id. at 115.[34]

The interpretation by the Commissioner of Internal Revenue pertained to a Treasury Regulation which in

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[34] *Cf.* Central Illinois Public Service Co. v. United States, 435 U.S. 21 (1978), where the Supreme Court precluded the IRS from retroactively applying a rule requiring employers to withhold certain taxes; during the relevant time, no regulation and no ruling required withholding and no employer could reasonably have suspected that withholding was required.

and of itself furnished no clear guide on the point at issue.

> It is true, as taxpayers contend and as we have indicated, that the language of the statute and the regulations as we have heretofore traced them may not be precise and unambiguous as to the term "useful life." It may be that the administrative practice with regard thereto may not be pointed to as an example of clarity, and that in some cases the Commissioner has acquiesced in inconsistent holdings.

364 U.S. at 100.

> They cannot be said to prove conclusively that the Commissioner was following a physically useful-life theory. . . . The most that can be said is that the element of compromise probably played a predominant role in the result in each case. Moreover, there is no indication in any of these cases that the amount of depreciation would have been changed by computing it on the basis of its useful life in the business. The cases do not seem to reflect considered judgments as to the proper meaning of the terms used in the depreciation equation and we find them of little value as precedents.

364 U.S. at 103-04.

Apart from the *Massey Motors* holding under less clear circumstances, the controlling circumstances here is that Ruling 1975-15 is an interpretative ruling, not a legislative change, and simply made explicit what was implicit in the property definition from the beginning.[35]

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[35] Judge Duniway expressed a similar view in *Sauder*, 648 F.2d at 1347.

> Closely related to the above argument is Sauder's contention that the agency's insistence on a formal unitization agreement is a retroactive requirement and that it would be inappropriate to apply the requirement to his case under the factors stated in *Retail, Wholesale and*

In *Tenn. Gas Pipeline v. Federal Energy Reg. Com'n*, 606 F.2d 1094, 1110 (D.C. Cir. 1979), Judge Leventhal rejected the notion that an agency's failure expressly to disapprove an industry's view or practice gave it

> an affirmative blessing, or—what is the same thing—estops the Commission from now asserting an interpretation contrary to that held by the pipelines. . . . Further, since the Commission relies on well-established principles of public utility law, it is not sufficient for petitioners to come forward with some conceivable interpretation of language in the advance payment orders that supports their view.

Judge Leventhal distinguished *Standard Oil*, noting that the court there reached "a different result where there existed no previously well-settled rule." *Id.* at n. 55.

There is simply no basis in the circumstances of the present case to find unreasonableness, unfairness, or any other element of estoppel in applying the agency interpretation to the relevant period in question here. The Supreme Court has declined to recognize an estoppel against the United States under more appealing facts involving applicants for social security benefits or citizenship.[36] Much less would we be inclined to do so on the facts here presented in favor of sophisticated oil field operators exploring the possibility of dubious regulatory leeway without even requesting an official interpretation.

Department Store Union v. NLRB, D.C.Cir., 1972, 466 F.2d 380, 390, and repeated by us in *Standard Oil*, *supra*, 596 F.2d at 1963-5.

However, we conclude that the agency's interpretation is not retroactive. It does not represent a "departure from well established practice" let alone an "abrupt departure." *Id.*

See also Energy Reserves, 589 F.2d at 1100.

[36] *See* Schweiker v. Hansen, 450 U.S. 785 (1981); Montana v. Kennedy, 366 U.S. 308 (1961).

VI. *Grigsby Is Controlling in Concept and Persuasive in Fact and Our Other Decisions Are Persuasive in Principle*

Since the argument on the motion to dismiss in the district court, Pennzoil has been quite ambivalent with reference to *Grigsby*. During later phases of the proceedings below it was difficult to tell whether it had framed its position in disregard of that decision,[37] was accepting it for whatever it was, or was seeking to overturn it by reason of additional evidence Pennzoil claimed to have discovered in its own case.[38] Before us Pennzoil has accepted *Grigsby* indeed almost embraced its holding as supportive of its position.[39]

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[37] The Court: Have you read the Grigsby opinion?

Counsel for Pennzoil: Your Honor, I must say I was aware of the Grigsby opinion. I have not read it. It was not cited by the Government as being something that I should be aware of for purposes of today's argument and I'm totally astounded that they will take the position that that case forecloses the present case and I doubt seriously that it does.

Tr. of Arg. on Motion to Dismiss Complaint. R. 0113-14.

[38] Counsel for Pennzoil: They [the Grigsby panel] had to accept DOE's characterization of what the C.L.C. interpreted for these regulations. Fortunately, your Honor, you are not in that position. The evidence that we have produced, if not a different result—and we are not necessarily quarreling with the result in Grigsby; we think it may have been right, but not for the reasons that the Court set forth, not because the right to produce per se was controlling, but because the definition was really focusing on 1972, and that the kind of entities that you had there, the accounting entities that existed during that base period were intended at least to be permitted to the producer to utilize as the property so that the system could work [sic].

Tr. of May 11, 1981 hearing, R. 02690-92.

[39] Point I of Pennzoil's principal brief that "Grigsby Does Not Control the Instant Case but Its Rationale Supports Pennzoil, Not DOE," seems a somewhat forlorn search for blessings in adversity.

Essentially for the reasons stated by the district court we believe that *Grigsby* dictates the outcome of the present case, by reason of both its authority under the doctrine of *stare decisis* and its concept of the "right to produce."

Disposing of Pennzoil's claim on the basis of *Grisgsby*, the district court noted the arguments there made:

> Commencing in October of 1974, Grigsby designated the total production from the new well as "new oil". He had two arguments to support this position. First he asserted that, under the definition of property found in Section 212.72 of the Regulation in 1974, the lease on which the new well was located defined the relevant property. Second, he argued that, even if the units created under state law defined the relevant property, there had been a new unit created after October 14, 1974 which had a zero base production control level ("BPCL").

514 F.Supp. at 517.

Judge Stapleton correctly observed that our *Grigsby* opinion "made short shrift of Grigsby's first argument" and that we had made plain that the "focus of the property definition is upon the right to produce not the fee or leasehold nature of the ownership interest." *Id.*

Judge Stapleton observed that the court in *Grigsby* initially summarized and commented upon Grigsby's second argument as follows:

> Grigsby argues that the Robert Leger Well No. 1 [the new well] production could not have been subject to the same "right to produce" as the Lucky Strike Well No.1[the original well] production, because the orders of the Louisiana Commissioner of Conservation unitizing the Heywood Sand, Reservoir A, Sand Unit B, from which the Lucky Strike Well No. 1 produced did not and could not include within the unitized area the reservoir from which the Robert Leger Well No. 1 produced.

> The premise of Grigsby's argument, that unitization is the source of the "right to produce" and, hence, the unitized premises defines the property, is correct where mineral fee or leasehold interests have been aggregated by unitization. . . .

514 F.Supp. at 518, quoting *Grigsby*, 585 F.2d at 1983.

It was noted that *Grigsby* held that "a new unit, and, accordingly, a 'new right to produce' had been created after 1972 and at least before June 24, 1976," and Judge Stapleton continued:

> The recognition that "rights to produce" can be created by unitization orders entered after 1972 is, of course, inconsistent with Pennzoil's argument that Section 212.72 froze "property" boundaries as they existed in 1972. It is true that the *Grigsby* opinion can be read to suggest that the result with respect to the period after June 26, 1976 was dictated, not by Section 212.72 of the Regulations, but rather by Ruling 1975-15 which had become effective in August of 1975. This fact does not aid Pennzoil, however, because the *Grigsby* court held that, depending on what the lower court might find to have been the status of the new well's production under Louisiana law between October 1974 and June 1976, there might have been a new "right to produce" created in 1974.

514 F.Supp. at 518-19.

Pennzoil and various amici curiae argue that the *Grigsby* court declined to decide the "validity" of Ruling 1975-15. Even were this so, in an important sense the position of DOE would be supported, for then the mandate of the property definition itself unaided by interpretation would have been recognized. That is the effect of the court's reasoning in any event. But in the context of the footnote relied upon by Pennzoil the court appears to

have been referring to procedural validity which had not been raised in the court below.[40]

While *Grigsby* is persuasive in fact and controlling in concept, many other decisions of this court are confirmatory in principle.[41] Indeed, *Standard Oil* itself, when its different circumstances are factored in, is consistent with the result reached here. Various district court opinions so recognize, with a few exceptions where essentially

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[40] 1. "Determination of new, released and stripper well crude oil for units formed prior to the date on which unit BPCL regulations were adopted (February 1, 1976 for enhanced recovery units and September 1, 1976 for all units) are subject to the provisions of FEA Ruling 1975-15 as modified on February 1, 1976." Ruling 1977-2, 42 Fed. Reg. 4409, 4415 (1977). Under Ruling 1975-15, the BPCL, in the case of a pre-1972 unitization, is the total 1972 monthly production from the unit. In the case of a post-1972 unitization, the BPCL is the total 1972 monthly production from all of the leases that now comprise the unit. We intimate no view on the validity of the promulgation of Ruling 1975-15, since the issue was raised for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120-21, 96 S.Ct. 2868, 49 L.2d 826 (1976).

Grigsby, 585 F.2d at 1084 n. 1.

[41] Taunton Municipal Lighting Plant Group, Inc. v. Department of Energy, 669 F.2d 710 (TECA 1982) (Nos. 1-8 and 1-9, decided Jan. 5, 1982, 4 Energy Mgt. (CCH) ¶ 26,350); Wiggins Brothers v. Department of Energy, 667 F.2d 77 (TECA 1981) (Nos. 5-53 and 5-57, decided Oct. 14, 1981, 4 Energy Mgt. (CCH) ¶ 26,343); Koch Refining Co. v. U.S. Dept. of Energy, 658 F.2d 799 (TECA 1981); Mountain Fuel Supply Co. v. U.S. Dept. of Energy, 656 F.2d 690 (TECA 1981), *supra*; Independent Oil v. Department of Energy, 650 F.2d 1230 (TECA 1981); UPG, Inc. v. Edwards, 647 F.2d 147 (TECA 1981), *supra*; Energy Consumers, Etc. v. Dept. of Energy, 632 F.2d 129 (TECA), *cert. denied*, 449 U.S. 832 (1980), *supra*; Energy Reserves Group, Inc. v. Department of Energy, 589 F.2d 1082 (TECA 1978), *supra*; General Crude Oil Co. v. Department of Energy, 585 F.2d 508 (TECA 1978), *cert. denied*, 439 U.S. 1070 (1979).

different situations are involved,[42] or where the basic rationale of *Grigsby* has been ignored.

VII. *Conclusions*

Even in the absence of our prior decisions, Ruling 1975-15 would be sustainable as a reasonable interpretation. It is consistent with the language of the property definition. It rationally balanced the objectives of the two-tier pricing structure. The "institutional" interpretation which consistently indicated that a unit of oil leases is a single property is entitled to deference, despite the individual comments and reactions of agency employees which were largely developmental, unofficial and exploratory and which did not bring the case within the *Standard Oil* situation or furnish grounds for any claims of unfair advantage as to Pennzoil or others interested in the Walker Creek Field Unit.

Pennzoil was hardly an innocent abroad interpreting in the midst of confusing babble a direction sign labeled in a foreign language. It was an experienced traveler on familiar terrain perceptively advised by its own counsel in its own interest, and deviating from the plainly indicated direction it had theretofore followed. It knew from

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[42] *See* State of La. v. Department of Energy, 519 F.Supp. 351 (W.D. La. 1981), and earlier opinion in same case, 507 F.Supp. 1365, *supra*, which did not question Ruling 1975-15 in its context, but disapproved retroactive application of later rulings of the agency dealing with reservoir wide production units claimed to be properties in view of the Louisiana law and the Unit agreements involved there. While the district court applied the "compelled construction" formula now rejected by us as a controlling rule for testing retroactive applicability of interpretations, more significantly it found that the "unit as property" concept applied also to reservoir-described units. We have no such complication in the present case; nor does that case, on the particular merits of which we express no opinion, challenge the concept of the unit's constituting the "property."

the regulations themselves that only an official interpretation by the General Counsel's Office could furnish any assurance for its new course; it chose not to request one.[43]

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[43] *General Crude*, 585 F.2d at 514 (*see also* appendix to opinion), deals with arguments strikingly similar in several respects to those of the case before us. There the district court had held that an agency decision was inherently arbitrary, not consistent with FEA regulations and directly contrary to the policy objectives of the EPAA. This court reversed. Up to the point General Crude Oil Company established the classification of its oil under review it had applied a different designation (*cf.* Pennzoil's treatment of its Tinsley Field production). Immediately prior to the alteration of its practice, the oil company orally consulted with an IRS agent (then involved in the administration of CLC regulations), such informal consultation apparently being instrumental in the change of practice later challenged by the agency. As in the present case the oil company did not request a formal interpretation from the agency. This court through Judge Estes commented:

> Appendix "A" hereto . . . shows General Crude's awareness that it could obtain a ruling from the Cost of Living Council on whether the Banning oil production "could be sold as a 'new item' by a 'refiner' . . . . Gary [the Petroleum Regulations Expert at the IRS Office] said that he thought the theory was tenable, without expressing an opinion as to whether or not it would be sustained by the Cost of Living Council. . . . He seemed to think that a substantial delay might result if the Company sought to obtain a ruling from the Cost of Living Council prior to making the sale. . . ."

585 F.2d at 514, n.4.

And in rejecting any controlling effect for the informal opinion of the IRS agent and the explanation that an official interpretation would have taken too long to have served the purposes of the oil company, we observed:

> Subparts A and B of Part 155 of the CLC Regulations . . . contain the procedures to be used for requesting agency interpretations, which do not include oral interpretations.

Id.

To the extent other informal advice was relied on, it was obviously wrong in its over-generalization and any more limited rationalization of it is foreclosed by *Grigsby*, the official interpretations as they were issued, and the essential property concept of the regulatory definition itself. Even were Pennzoil to succeed in explaining away *Grigsby*—in erasing the facts and figures of it applicable to this case—the concept of the property definition there expressed would continue to sustain the ruling challenged here.[44]

The judgment of the district court dismissing plaintiff's claims is affirmed and the case is remanded for consideration of the counterclaim of the United States.

IT IS SO ORDERED.

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[44] I am perfectly aware of the fact, he replied.

> Then you also know that they summon to their aid visible forms, and discourse about them, though their thoughts are busy not with these forms, but with their originals, and though they discourse not with a view to the particular square and diameter which they draw, but with a view to the absolute square and the absolute diameter, and so on. For while they employ by way of images those figures and diagrams aforesaid, which again have their shadows and images in water, they are really endeavouring to behold those abstrations which a person can only see with the eye of thought.

Plato, The Republic 233 (J. Davies & D. Vaughan trans. 1895).

JAMESON, Judge, concurring.

I concur in the holding and generally in Judge Christensen's opinion, although in my opinion the uncertain and confusing interpretations of § 212.72 by the DOE prior to the adoption of Rule 1975-15 raise a close question with respect to the retroactive application of the Rule under our holding in *Standard Oil Company* v. *DOE*, 596 F.2d 1029 (TECA 1978). I conclude, however, that Pennzoil's own conduct, including its failure to secure a timely, official agency interpretation of § 212.72 and its inconsistent treatment of its production from the Tinsley and Walker Creek fields, precludes its recovery in this action.

I agree with the analysis of *Standard Oil*, *supra*, as set forth in the majority opinion and in *Sauder* v. *DOE*, 648 F.2d 1341 (TECA 1981), and particularly that there is no merit in the contention that even though the DOE's interpretation is reasonable, it cannot be applied retroactively unless it is "compelled". We concluded in *Standard Oil* that the regulations were ambiguous; that there was confusion and uncertainty among both FEA officials and the refiners; that the DOE's interpretation was not "contemporaneous" with the relevant period; and that while the FEA's rule was a reasonable interpretation it was not "compelled". Accordingly it was then necessary to determine whether the subsequent rulemaking procedures could be given retroactive effect "under the factual situation [there] presented".[1] The same determination must be made here.

It is true that some of the agency's interpretations of § 212.72 support the 1975 ruling and the interpretation found implicit in the court's opinion. Most significant is

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[1] It was undisputed in *Standard Oil* that "during the relevant period the only public pronouncements were made by officials of the Office of Compliance and the FEA auditors and were contrarty to the interpretation set forth in" the rule in question. 596 F.2d at 1056.

a formal agency interpretation issued by the General Counsel of the FEA expressly supporting an "aggregate treatment" interpretation of § 212.72.[2] The other four interpretations cited in the opinion, n. 11 *supra*, deal with units formed before 1972, however, and for that reason are of limited value with respect to post 1972 unitization.[3]

On the other hand, the FERC issued two decisions in April and June of 1975 which give the strong if not compelling impression that "aggregate treatment" would not be allowed under § 212.72. *Sun Oil Co., supra*, clearly contemplates computation of production on an individual property basis.[4] *Empire Drilling Co., supra*, expressly requires individual treatment.[5] Although exception relief was denied in each case because of the applicants' failure to prove gross inequity or serious hardship, the text of those decisions would, in my opinion, reasonably lead a producer to believe that the DOE interpreted § 212.72 to require computation of a unit's production on a property by property basis.

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[2] Interpretation No. 1975-4, issued Feb. 14, 1975; later published at 42 Fed. Reg. 23726 (May 18, 1977).

[3] Although issued to different companies (but not to Pennzoil) in 1974 and early 1975, none of these Interpretations was published in the Federal Register until March, 1977.

[4] "Since crude oil was produced and sold from 75 different properties in the . . . Field in 1972, current crude oil production and sales from any given property must exceed the production from that property in the corresponding month of 1972 . . . . before it can be sold at exempt prices." *Sun Oil Co.*, 2 FEA ¶ 83,075, (Mar. 21, 1975).

[5] "Under the provisions of 10 C.F.R., part 212, Subpart D, all current crude oil production and sales from each of the nine Danberry Unit properties which does not exceed the production from that property in the corresponding month of 1972 . . . is subject to the ceiling prices established under 10 C.F.R., 212.73" *Empire Drilling Co.*, 2 FEA ¶ 83,142 (May 9, 1975), aff'd 2 FEA ¶ 80,876 (Sept. 2, 1975).

Pennzoil also presented evidence that it was advised by FEO officials in Houston, Texas, that for units formed after 1972, certification as to new and released oil would continue to be conducted on an individual property basis. Pltf. Ex. 70; Pltf. Ex. 150. That advice was apparently confirmed shortly thereafter by James Langdon, then Director of the Office of Regulatory Review of the FEO. Def. Ex. 41. There is also evidence that Langdon gave similar advice to other producers. Affidavit of Ben C. Newman (R. 1416-17). In addition, on February 12, 1975 Langdon presented a paper at an Oil and Gas Institute in which he stated that a "property by property" treatment was a possible interpretation of § 212.72. Pltf. Ex. 115.

On December 30, 1974, the National Office of Compliance and Enforcement of the FEA distributed a manual to be used in agency investigations which expressly allowed producers the option of applying the regulations on a lease-by-lease basis even in a unitized field. Pltf. Ex. 109-A.

Affidavits of former DOE officers, now affiliated with oil companies, state that Ruling 1975-15 is inconsistent with the original agency interpretation of § 212.72. Although the recollections of agency staff are not entitled to great weight in construing statutes or divining the meaning of a regulation, they may be considered where, as here, "the reviewing court does not have the benefit of a detailed administrative record developed in the course of normal rulemaking procedures." *Nader* v. *Sawhill*, 514 F.2d 1064, 1067 n. 6 (TECA 1975); *Standard Oil*, 596 F.2d at 1045, 1053-54; *Getty Oil Co.* v. *DOE*, 581 F.2d 838 (TECA 1978), *cert. denied*, 439 U.S. 1070 (1979); *Pacific Coast Meat Jobbers Ass'n, Inc.* v. *Cost of Living Council*, 481 F.2d 1388, 1390 (TECA 1973).

The contemporaneous construction of § 212.72, as revealed in these official Interpretations, FERC decisions, agency forms and manuals, informal telephonic communications, papers presented to industrial conferences, affidavits of former agency personnel, and post-1975 regulatory changes does not, in my opinion provide "almost a bright line of agency explanation . . . upon the particular principle in this case." In fact, the DOE appears to have made little effort to insure that the industry was receiving a clear and consistent interpretation of § 212.72.

As in *Standard Oil*, the regulations here were ambiguous and there was uncertainty and confusion among both the DOE and the producers with respect to their interpretation. I cannot find, however, that *Pennzoil* was entitled to rely upon the interpretation for which it contends. In *Standard Oil*, the only public pronouncements by DOE officials during the relevant period were contrary to the interpretation for which the DOE sought retroactive application. (See n. 1) Here Pennzoil was fully aware of the uncertainty, confusion, and different interpretations but made no reasonable effort to obtain a ruling from the General Counsel of the DOE.

A lawyer of Pennzoil was advised by another attorney by letter dated July 12, 1974 (Pltf. Ex. 71), not long after the establishment of the Walker Creek Field, that the "problem had been raised previously and is currently under consideration by the General Counsel's Office. . . ." As Judge Christensen noted, this seems both an invitation to seek advice and a warning that if it did not do so it was proceeding at its own peril. n. 15, *supra*. On June 14, 1974, Pennzoil had written to Cities Service Oil Company, regarding pricing of oil from the Walker Creek unit, in which it stated that it "expect[ed] a ruling from the Federal Energy Office in the reasonably near future. . . ." Yet there is no evidence that this ruling was ever requested or received by Pennzoil. Whether the result of negligence or an intentional decision, Pennzoil know-

ingly proceeded at its own peril when it relied on the conflicting informal opinions it received as to the proper interpretation of § 212.72. For that reason I concur in the court's decision.[*]

[*] I do not believe that *Grigsby* dictates the outcome of the present case. Its concept of "right to produce" does not answer the question presented here, and the two cases are factually distinguishable. Moreover, the *Grigsby* court expressly declined to consider the issue of the validity of the promulgation of Ruling 1975-15. 585 F.2d at 1084 n. 1.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Civil Action No. 78-335

PENNZOIL COMPANY, *Plaintiff*,

v.

DEPARTMENT OF ENERGY, *et al.*, *Defendants*.

Bruce M. Stargatt, Esquire, Jack B. Jacobs, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware; John P. Mathis, Esquire, Randolph Q. McManus, Esquire, of Baker & Botts, Washington, D.C.; Perry O. Barber, Jr., Esquire, James W. Shaddix, Esquire, Jay G. Martin, Esquire, Pennzoil Company, Houston Texas, Attorneys for Plaintiff

James W. Garvin, Jr., Esquire, United States Attorney, Peggy L. Ableman, Esquire, Assistant United States Attorney, Wilmington, Delaware; Larry P. Ellsworth, Esquire, Dan Shea, Esquire, Ellen P. Rosenberg-Blatt, Esquire, Department of Energy, Washington, D.C.; George Kielman, Esquire, Dean S. Cooper, Esquire, Office of Special Counsel, Washington, D.C., Attorneys for Defendants

MEMORANDUM OPINION

Wilmington, Delaware
May 18, 1981

STAPLETON, District Judge:

Plaintiff Pennzoil Company ("Pennzoil") brought this action against the Department of Energy and the Secretary of Energy (collectively "DOE") to obtain a judicial determination of the validity of DOE Ruling 1975-15 as applied to its Walker Creek field which was unitized on May 1, 1974. The case is presently before me on cross motions for summary judgment. All of the

facts necessary to the determination of these motions are set forth in two prior opinions of this Court* and need not be repeated here.

Pennzoil asserts that Ruling 1975-15 is a "legislative rule representing a substantive policy choice". As a consequence, it is said, Ruling 1975-15 could not have been adopted in compliance with the Administrative Procedure Act and the Federal Energy Administration Act without notice and opportunity for comment. I cannot accept this argument, however, because it has been determined, authoritatively as far as this Court is concerned, that Ruling 1975-15, in the respects here challenged, effected no change in the pre-existing law.

In *Grigsby v. Department of Energy*, 585 F.2d 1069 (TECA 1978), *cert. denied* 440 U.S. 908 (1979), the plaintiff operator of a unit formed in 1969 decided on October 14, 1974 to terminate crude production from what had previously been the unit well and to commence production from a new well drilled on a separate leasehold located within the same unit. Thereafter, it was determined that there were two distinct reservoirs in the field and the Louisiana Commission of Conservation issued orders on June 24, 1976 recognizing the two separate reservoirs and unitizing the newly discovered reservoir. Grigsby's new well was designated as the unit well for one of the newly constituted units in the newly discovered reservoir.

Commencing in October of 1974, Grigsby designated the total production from the new well as "new oil". He had two arguments to support this position. First he asserted that, under the definition of property found in Section 212.72 of the Regulation in 1974, the lease on which the new well was located defined the relevant property. Second, he argued that, even if the units created under state law defined the relevant property, there had been a new unit created after October 14, 1974 which had a zero base production control level ("BPCL").

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* 466 F. Supp. 238 (D. Del. 1979) and 480 F. Supp. 1126 (D. Del. 1979).

As I observed in my earlier opinion, the Temporary Emergency Court of Appeals made short shrift of Grigsby's first argument:

> Grigsby is incorrect in stating that "property" is measured solely by the fee or leasehold interest. The focus of the "property" definition is upon the "right to produce," not the fee or leasehold nature of the ownership interest. If Grigsby were correct in stating that the nature of the ownership interest alone controlled the definition of "property," a mineral lessee could evade the price control and allocation programs by pooling his interest with that of neighboring lessees and gerrymandering the situs of the well among the various leaseholds.
>
> The "right to produce" arises from a combination of sources, including, but not limited to, the nature of the ownership interest, contractual extension or restriction of ownership interest, and orders of state regulatory agencies. A mineral fee owner has a "right to produce" subject to state law. A mineral leasehold owner has a "right to produce" subject to the terms of the lease and state law. The mineral leasehold owner's "right to produce" may be further circumscribed by voluntary or compulsory pooling. Although the fee or leasehold interest may be the origin of the "right to produce", such a "right to produce" is controlled, limited, or extended by contractual agreement and state authorities. . . .

585 F.2d at 1083.

On its face, this holding would seem to foreclose anyone operating a unitized property from determining "new oil" on the basis of a comparison between current production on individual leases subject to the unitization agreement or order and the 1972 production from those individual leases. Pennzoil suggests, however, that the Grigsby holding is limited to units created before 1972 and urges a construction of Section 212.72

which would look only to rights to produce as they existed in 1972 in order to define the scope of the relevant property.

There is nothing in TECA's analysis of Grigsby's first argument which would support the distinction Pennzoil seeks to make. Moreover, its *holding* with respect to Grigsby's second argument is irreconcilable with its theory.

The court in *Grigsby* initially summarized and commented upon Grigsby's second argument as follows:

> Grigsby argues that the Robert Leger Well No. 1 [the new well] production could not have been subject to the same "right to produce" as the Lucky Strike Well No. 1 [the original well] production, because the orders of the Louisiana Commissioner of Conservation unitizing the Heywood Sand, Reservoir A, Sand Unit B, from which the Lucky Strike Well No. 1 produced did not and could not include within the unitized area the reservoir from which the Robert Leger Well No. 1 produced.
>
> The premise of Grigsby's argument, that unitization is the source of the "right to produce" and, hence, the unitized premises defines the property, is correct where mineral fee or leasehold interests have been aggregated by unitization.
>
> . . .

Id. TECA then went on to hold that a new unit, and, accordingly, a new "right to produce" had been created after 1972 and at least before June 24, 1976:

> It is beyond dispute that the Robert Leger Well No. 1 [new well] production was officially recognized as production beyond the Heywood Sand, Reservoir A, on June 24, 1976, when the Louisiana Commissioner of Conservation issued two orders recognizing two separate reservoirs in the North Jennings Field and unitizing the newly discovered reservoir. The unitization of the *Upper* Heywood "A" Sand, Reservoir A, Sand Unit B, and the designation of the Robert Leger Well No. 1 as the unit well, in Order No.

> 464-K, gave rise to a new "right to produce" and, thus, a new "property," under Ruling 1975-15. Accordingly, we hold that Grigsby was authorized to charge "new oil" prices for the Robert Leger Well No. 1 [new well] production from the Upper Heywood RA SU B as of June 24, 1976.

(Emphasis added). *Id.* at 1085.

The recognition that "rights to produce" can be created by unitization orders entered after 1972 is, of course, inconsistent with Pennzoil's argument that Section 212.72 froze "property" boundaries as they existed in 1972. It is true that the *Grigsby* opinion can be read to suggest that the result with respect to the period after June 26, 1976 was dictated, not by Section 212.72 of the Regulations, but rather by Ruling 1975-15 which had become effective in August of 1975. This fact does not aid Pennzoil, however, because the *Grigsby* court held that, depending on what the lower court might find to have been the status of the new well's production under Louisiana law between October 1974 and June 1976, there might have been a new "right to produce" created in 1974.* *Id.* at 1085-86.

Pennzoil suggests that the *Grigsby* court did not have the benefit of all the legislative history and contemporaneous construction evidence which Pennzoil has marshalled in this case, and asks me to reexamine the issues resolved in *Grigsby*. Whatever may or may not have been before TECA in the *Grigsby* case, however, it is not my function to reconsider square holdings of that court.

Since Ruling 1975-15 effected no chance in the law so far as Pennzoil's Walker Creek field is concerned, the failure of the DOE to follow the notice and comment procedure is of no consequence and Pennzoil's procedural invalidity argument must be rejected.

SUBMIT ORDER.

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* The *Grigsby* case was recently reaffirmed by TECA in *Sauder v. DOE*, No. 77-1117 (TECA April 24, 1981).

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 3-27

PENNZOIL COMPANY, *Plaintiff-Appellant,*

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.,*
Defendants-Appellees.

Before CHRISTENSEN, JAMESON and MAXWELL, Judges.

ORDER

Upon consideration of the petition for rehearing and suggestion for rehearing *en banc* filed on behalf of Appellant, Pennzoil Company,

IT IS HEREBY ORDERED that the petition for rehearing is DENIED.

IT IS FURTHER ORDERED that the suggestion for rehearing *en banc* is DENIED. The mandate is to issue May 24, 1982.

FOR THE COURT:

Donna M. Bold
Clerk

by: /s/ STEPHEN M. MANCUSO
Stephen M. Mancuso
Deputy Clerk

May 17, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

C. A. No. 78-335

PENNZOIL COMPANY, *Plaintiff*,

v.

DEPARTMENT OF ENERGY, JAMES B. EDWARDS, SECRETARY, Department of Energy, and the United States of America, *Defendants*.

JUDGMENT ORDER

Upon consideration of the plaintiff's amended complaint, the cross-motions for summary judgment, the arguments submitted in support thereof and in opposition thereto, for the reasons set forth in the Court's Memorandum Opinion of May 18, 1981, it is:

ORDERED that plaintiff's motion for summary judgment on its amended complaint is denied;

ORDERED that defendants' motion for summary judgment on plaintiff's amended complaint is granted;

ORDERED and adjudged, the Court having expressly determined there is no just reason for delay, that the Clerk enter final judgment for defendants, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, on all claims raised by plaintiff in its amended complaint.

/s/ WALTER K. STAPLETON
United States District Judge

Dated: June 10, 1981

10 C.F.R. § 212.72 Definitions.

Base Production Control Level

"Base Production Control Level" for a particular month for a particular property means:

(1) if crude petroleum was produced and sold from that property in every month of 1972, the total number of barrels of domestic crude petroleum produced and sold from that property in the same month of 1972;

(2) if domestic crude petroleum was not produced and sold from that property in every month of 1972, the total number of barrels of domestic crude petroleum produced and sold from that property in 1972 divided by 12.

39 Fed. Reg. 1924 (Jan. 15, 1974), originally codified as 6 C.F.R. § 154(b), 38 Fed. Reg. 22536, 22538 (Aug. 22, 1973). This definition was amended by substituting "crude oil" for "crude petroleum" effective August 30, 1974. 39 Fed. Reg. 31622 (Aug. 30, 1974).

Property

"Property" is the right which arises from a lease or from a fee interest to produce domestic crude oil.

New Crude Petroleum

"New crude petroleum" means the total number of barrels of domestic crude petroleum produced and sold from a property in a specific month less the base production control level for that property.

39 Fed. Reg. 1924 (Jan. 15, 1974), originally codified at 6 C.F.R. § 154(b), 38 Fed. Reg. 22536, 22538 (Aug. 22, 1973).

RULING 1975-15
Property; Definition for Purposes of Computing Base Production Control Level

I. Introduction

Pursuant to Subpart D of the Mandatory Petroleum Price Regulations, sales of domestic crude oil are subject to the ceiling price rule of 10 CFR 212.73. However, as an incentive to producers to increase current production above 1972 levels, the price regulations permit the sale, without regard to the ceiling price, of the amount of new and released crude oil produced from a particular property in each month. In 10 CFR 212.72, the definitions of "new crude oil" and "released crude oil" provide, in relevant part:

"New crude oil" means, with respect to a specific property, the total number of barrels of domestic crude oil produced and sold in a specific month, less (1) the base production control level for that month, and less (2) the current cumulative deficiency in base production control level crude oil. . . .

"Released crude oil" means that part of the base production control level crude oil for a property in a particular month which is equal to the total number of barrels of new crude oil produced and sold from that property in a specific month. The amount of released crude oil for a property in a particular month shall not exceed the amount of the base production control level crude oil for that property in that month. . . .

Thus, calculations of new and released crude oil are determined by looking to the relationship between current monthly production and the base production control level ("BPCL") for that month, *for each particular property*. "Based production control level crude oil" is also defined in 10 CFR 212.72:

"Base production control level crude oil" for a particular month for a particular property means:

(1) If crude oil was produced and sold from that property in [illegible] month of 1972, the total number of barrels of domestic

crude oil produced and sold from that property in the same month of 1972;

(2) If domestic crude oil was not produced and sold from that property in every month of 1972, the total number of barrels of domestic crude oil produced and sold from that property in 1972 divided by 12.

Therefore, the new and released provisions extend generally to those levels of current production in excess of 1972 production levels, and the price regulations establish the concept of "property" as a reference by which a producer is to compare current production levels against those of 1972 to determine the amount of increased production.

The definition of "property," for purposes of determining new and released crude oil, is found at 10 CFR 212.72:

"Property" is the right which arises from a lease or from a fee interest to produce domestic crude oil.

Property is also defined in the context of the stripper well lease exemption in 10 CFR 210.32 as

the right that arises from a lease in existence in 1972 or from a fee interest to produce crude oil in existence in 1972 and is coextensive with the term "property" used in § 212.72 for purposes of determining "base production control level crude oil."

For purposes of the price regulations then, the property concept is one that identifies the *right to produce crude oil*, whether that right arises from a lease or from a fee interest. While the FEA recognizes that various state and other federal regulatory authorities may, for other purposes, have monitored production levels on other bases (*e.g.*, by physical boundaries or by producing formations or reservoirs), it is necessary that the price regulations embody a uniform concept, the parameters of which can be readily applied to all domestic production, regardless of varying state classifications. For this reason, FEA regulations utilize, as a reference, a property concept, based upon the right

to produce crude oil, that can be readily identified for all producers.

Accordingly, in applying the provisions of Subpart D regarding new and released crude oil, a producer must look to the limits of the right to produce crude oil in defining a particular property. Since the production of crude oil is anticipated to be an on-going operation, normally there will have been no changes in ownership or restructuring of the right to produce crude oil since before 1972. This ruling is addressed to those cases where, due to such a change or restructuring since 1972, an interpretation of the definition of "property" is required for proper application of the price rules in determining BPCL.

Because of the need to quantify the 1972 monthly production levels for a particular property in order to calculate that property's base production control level for each month, the producer must refer to the right to produce crude oil as it existed in 1972 in order to define the property involved. This is dictated, of course, by the need to compare like quantities, today and in 1972, in order to ensure a meaningful application of the new and released provisions. In the majority of cases, involving only one lease that remains unchanged since 1972, a producer will simply compare his current monthly production for the property (the lease in those cases) against the corresponding monthly production for the lease in 1972.

II. Examples

A. *Pre-1972 Unitization.*—A property that was unitized prior to 1972 requires the same treatment as a single property that has been unchanged since 1972. Often, where two or more leases have reached the declining stages of production, they are unitized (*i.e.*, the operations of the several leases are combined, more efficiently to undertake enhanced recovery techniques.) Such techniques usually involve the conversion of some previously producing wells to injection wells and/or the shutting-in of other wells in a coordinated overall-production effort, and for this reason some leases are left after unitization with fewer producing

wells within their geographical boundaries than before. Unitization sometimes results in one or more leases being left only with injection wells, or with no operating wells at all. Because this realignment of producing patterns, then, may result in the distorted *actual* production from any one lease comprising the unit, production from the unit is allocated to each lease based upon *inputed* production percentages. Accordingly, the agreement under which the several leases are unitized typically combines the several rights to produce crude oil that, prior to unitization, existed in the previous producers into a single right to produce crude oil now existing in the unit. Generally, therefore, since the unit agreement signifies one right to produce crude oil arising from several leases or fee interests, the unit defines the property.

Accordingly, for purposes of determining new and released crude oil, the current total monthly production from a unitized property must be compared with limits of the corresponding right (or rights) to produce crude oil that existed in 1972. Therefore, in cases of pre-1972 unitizations, the total current monthly production from the unit must be compared with the corresponding 1972 total monthly production from the unit. This will avoid the anomalies that are likely to result from attempting to compare current actual or imputed monthly production for each lease within the unit with actual or imputed monthly production for individual leases in 1972.

B. *Post-1972 Unitization.*—In the case of a property that was unitized after calendar year 1972, the need for comparison of like quantities requires the producer in computing the BPCL to measure and total the individual 1972 monthly production levels for each of the leases that now comprise the unit. Accordingly, for example, where a unit consists of several leases that were unitized in 1973, the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that now comprise the unit. Under no circumstances, therefore, would a post-1972 unitization create a "new" property, *i.e.*, one that has no BPCL.

Example 1: In 1973, seven leases were unitized. For each lease, the March 1972 production was as follows:

A—500 barrels
B—750 barrels
C—350 barrels
D—800 barrels
E—400 barrels
F—1000 barrels
G—200 barrels

Production from the unit in March 1975 was 4300 barrels. Totaling the March 1972 production levels of each lease yields a BPCL of 4000 barrels. Accordingly, since the March 1975 production from the unit exceeded the property's BPCL by 300 barrels, and assuming there is no current cumulative deficiency in BPCL for any of the leases or for the unit, 300 barrels of new and 300 barrels of released crude oil may be sold by the producer without regard to the ceiling price rule.

C. *Unitization During 1972.*—In those cases where a property was unitized *during* 1972, comparison of like quantities requires a two-stage computation of BPCL to be done with reference to 1972 production levels. For that portion of calendar year 1972 before unitization, the BPCL is equal to the total production from all of the several leases that now comprise the unit; for the remaining portion of calendar year 1972 after unitization, the BPCL is equal to the total production from the unit.

Example 2: Assume that the seven leases in Example 1 were unitized on April 1, 1972, and that the production figures shown in Example 1 represent the production levels for each lease in January, February, and March of that year. Thereafter the unit produced crude oil at the rate of 4000 barrels in April and May, at the rate of 4100 barrels in June, July and August, and at the rate of 4150 barrels in September, October, November and December.

For each of the months of January through March, the BPCL is 4000 barrels (*i.e.*, the total production of all leases com-

prising the unit). For the months after April 1, the BPCL is equal to the total production of the unit, *i.e.*, 4000 barrels in the months of April and May, 4100 barrels in the months of June, July, and August, and 4150 barrels in the months of September, October, November and December.

In sum, in determining the BPCL for a particular property, the producer must look to the property as it existed in 1972 in order to establish the appropriate production levels.

D. *Post-1972 Subdivision.*—Just as a post-1972 unitization does not establish a new property, neither does the subdivision after 1972 (through assignment, creation of new leases, or otherwise) of a single right to produce crude oil into several rights to produce crude oil establish a new property for purposes of measuring the BPCL and determining whether any new or released crude oil has been produced.

Example 3: A is a firm that produced crude oil from a 650 acre lease in 1972. The lease established in A a single right (assignable in whole or in part) to produce crude oil from the entire 650 acres. In 1974, A assigned 100 acres to B, who drilled for and began producing crude oil. During 1972, there were no producing wells on the 100 acres assigned from A to B.

The production from B's lease is not necessarily classified as new crude oil.

The fact that during 1972 there were no producing wells within the geographical boundaries of the lease now operated by B does not establish, *per se*, that all of B's production will qualify as new oil. Only when the total current production from the entire 650 acres is measured against the 1972 production from the comparable area can a determination be made as to the existence of new and released crude oil.

The result reached in Example 3 is consistent with the policy that underlies the two-tier pricing system. For if instead of assigning a portion of the original lease to B, A developed that portion of the lease himself, the production of new oil would

occur only if production from the entire property exceeded 1972 levels for the entire 650 acres. That is, where A's property consisted of a single right to produce crude oil from a 650 acre lease, the drilling of a new well located upon a previously undeveloped portion of the lease would not automatically establish new crude oil. Under no circumstances does the mere drilling of a new well automatically establish the production as new crude oil. Production from a property qualifies as new crude oil only if in excess of the property's 1972 production levels and any current cumulative deficiency. The result in the example above is no different merely because A has assigned to B the right to produce crude oil from a portion of the lease. Obviously, neither would B's acquisition from A of the right to produce crude oil from the entire 650 acres establish a new property, resulting in the production of all new oil. Rather, the BPCL for B's property in that case would be equal to the 1972 production levels from the property described by A's right to produce crude oil in 1972. A's transfer of less than the entire property does not yield a different result.

E. *Subdivision During 1972.*—Cases where a property was subdivided *during* 1972 are governed by a rule similar to that described in Example 2 for unitization during 1972. The BPCL during the first portion of the year (*i.e.*, before the subdivision) is equal to the monthly production in 1972 from the entire lease; during the second portion of the year (*i.e.*, after the month in which the subdivision occurred), the BPCL is equal to the two leases.

Example 4: A is a firm that produced crude oil from a 650 acre lease since 1969. In the first portion of 1972, the property's production levels were as follows:

January—400 barrels
February—450 barrels
March—450 barrels
April—500 barrels

On May 1, A transferred 250 acres to B. During 1972, there were no producing wells on the 250 acres transferred from A to B. The corresponding production levels for the balance of 1972 were as follows:

	Lease A (barrels)	Lease B (barrels)
May	500	0
June	400	50
July	450	100
August	500	150
September	500	200
October	550	200
November	500	200
December	450	200

Accordingly, for the months from January through April, the BPCL is equal to the production from the entire 650 acres (A's lease), *i.e.*, 400 barrels for the month of January, 450 barrels for the months of February and March, and 500 barrels for the month of April. For the months of May through December, the BPCL is still equal to the total production from the entire 650 acres (now A's lease *plus* B's lease), *i.e.*, 500 barrels for the month of May, 450 barrels for the month of June, 550 barrels for the month of July, 650 barrels for the month of August, 700 barrels for the month of September, 750 barrels for the month of October, 700 barrels for the month of November, and 650 barrels for the month of December.

For any current month, the production from A's lease plus the production from B's lease must exceed the BPCL and any cumulative deficiency before any crude oil may be sold without regard to the ceiling price rule.

In cases where a property has been subdivided during or since 1972, the current producers must show that the accumulated total current production from the present leases is in excess of the 1972 production levels for the property as it existed in 1972 plus any current cumulative deficiency in order to establish new

and released crude oil. Where the producers have determined that based upon the proper application of the new and released provisions as interpreted in this Ruling, a specific amount of current production qualifies as new and released, they may allocate such new and released crude oil among themselves in whatever proportions they may agree upon. If they are unable to agree, they may petition the FEA pursuant to Subpart G of Part 205 for a resolution.

F. *Production From More Than One Reservoir on a Single Property.*—Because the property concept is based upon the right to produce crude oil, whether arising from a lease or from a fee interest, the existence of two or more separate and distinct reservoirs will not in itself create two or more separate "properties". Therefore, for purposes of determining BPCL, where a producer holds a single right to produce crude oil from two or more reservoirs, together the two or more reservoirs constitute a single property; where there are separate and distinct rights to produce crude oil from each reservoir, each reservoir accordingly represents a different property.

Example 5: O is the fee owner of a 650 acre parcel of land. In 1969, O executes a lease granting A the exclusive right to produce crude oil from the entire 650 acres. In 1972, A was producing crude oil from a reservoir at the level of 2,000 feet. A reservoir at the level of 3,000 feet had not at that time ever produced crude oil. In 1975, A drills a well and begins to produce crude oil from a separate reservoir at the level of 3,000 feet.

Since A holds the right to produce crude oil from all levels, the property consists of the entire 650 acres including *both* reservoirs. Production does not qualify as new unless the total amount of monthly production from both reservoirs is in excess of 1972 levels and any current cumulative deficiency from the entire 650 acres.

40 F. R. 40832 (September 4, 1975).

MOTION FILED
JUN 25 1982

No. 81-2305

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PENNZOIL COMPANY,

Petitioner,

v.

DEPARTMENT OF ENERGY, and
JAMES B. EDWARDS, Secretary of Energy,
and the UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY
COURT OF APPEALS OF THE UNITED STATES

MOTION OF COTTON PETROLEUM CORPORATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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June 25, 1982

No. 81-2305

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PENNZOIL COMPANY,

Petitioner,

v.

DEPARTMENT OF ENERGY, and
JAMES B. EDWARDS, Secretary of Energy,
and the UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY
COURT OF APPEALS OF THE UNITED STATES

MOTION OF COTTON PETROLEUM CORPORATION
FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Cotton Petroleum Corporation ("Cotton") respectfully moves for leave to file the attached amicus curiae brief in

support of the petition for a writ of certiorari filed by Pennzoil Company ("Pennzoil"). Pennzoil has consented to the filing of this brief but the Respondent has not at this time responded. The letter granting Petitioner's consent has been lodged with the Clerk.

Cotton has a particular interest in this case because the decision below by the Temporary Emergency Court of Appeals ("TECA") addresses the same legal issue raised by Cotton in an action pending in the United States District Court for the Northern District of Oklahoma. Cotton Petroleum Corporation v. Edwards, No. 79-C-217-B. In that case, Cotton has moved for summary judgment on the basis that Ruling 1975-15 was not properly promulgated and cannot be retroactively applied to require Cotton to pay approximately one million dollars in alleged

overcharges. TECA's decision in the instant case, upholding the validity and retroactive application of Ruling 1975-15, has precluded a determination of Cotton's motion in the district court.

Since TECA apparently considered the impact upon Petitioner of the retroactive application of Ruling 1975-15, the Petitioner cannot properly raise, in its brief, the issue of TECA's failure to consider the impact of retroactivity on other members of the industry, such as Cotton. Cotton seeks to submit an amicus curiae brief to inform this Court that TECA's retroactive application of an agency's "interpretative" ruling to the entire industry, without consideration of its impact upon that industry, conflicts with decisions of Courts of Appeals in other circuits and raises an important question of federal law which should be decided by this Court.

For these reasons, Cotton respectfully requests that its motion for leave to file an amicus curiae brief be granted and submits the attached amicus curiae brief for this Court's consideration.

Respectfully submitted,

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No. 81-2305

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PENNZOIL COMPANY,

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DEPARTMENT OF ENERGY, and
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY
COURT OF APPEALS OF THE UNITED STATES

AMICUS CURIAE BRIEF FOR COTTON PETROLEUM
CORPORATION IN SUPPORT OF PETITIONER

Interest of the Amicus Curiae

Cotton Petroleum Corporation ("Cotton") is an independent crude oil

producer and the operator of the North Goose Lake Unit, a secondary recovery unit located in Sheridan County, Montana. Cotton submits this amicus curiae brief in support of the petition for writ of certiorari of Pennzoil Company ("Pennzoil") and also adopts the brief filed by Pennzoil.

The decision of the Temporary Emergency Court of Appeals ("TECA") upholding the validity of Ruling 1975-15 and its retroactive application to the pricing methods utilized by Pennzoil for its Walker Creek Unit has a direct and substantial impact upon Cotton and the other working interest owners of the North Goose Lake Unit. In a 1977 remedial order, Respondent Department of Energy ordered Cotton to repay more than $700,000 for alleged violations of the Mandatory Petroleum Price Regulations as interpreted in Ruling 1975-15. These alleged

overcharges with accrued interest currently exceed $1,000,000.

In April 1979, Cotton brought an action against Respondent in the United States District Court for the Northern District of Oklahoma (No. 79-C-217-B), seeking, inter alia, to set aside the remedial order because it is based upon an invalid agency ruling (Ruling 1975-15). Cotton sought summary judgment on the issue of the validity of Ruling 1975-15 but the district court ordered the motion held in abeyance because the same issue was pending before TECA in the instant case. Cotton has acknowledged to the district court that TECA's decision in the instant case is apparently dispositive of Cotton's claim as to the validity and retroactivity of Ruling 1975-15.

Cotton submits this amicus curiae brief to advise this Court that TECA's decision, while limited in its factual analysis to a consideration of factors unique to Pennzoil, has no such limitations on its legal conclusion. Indeed, TECA holds, without any consideration of the motivation, intent or behavior of, or fairness to, any other member of the industry, that Pennzoil's behavior is, by itself, sufficient to justify the retroactive application of Ruling 1975-15 to the entire industry. Such reasoning disregards the well-established precedents of other Courts of Appeals, raises a substantial issue of federal law and constitutes an independent basis for granting a writ of certiorari.

Reasons for Granting the Writ

1. TECA's Retroactive Application Of An Agency "Interpretative" Rule Without Consideration Of Its Impact Upon The Affected Industry Conflicts With Decisions By The Courts Of Appeals For Other Circuits.

TECA's decision that Pennzoil's behavior supports the retroactive application of Ruling 1975-15 to the entire industry creates a precedent which conflicts with the prevailing body of administrative law in other circuits. No other Court of Appeals has upheld the retroactivity of an agency rule of general application without consideration of the impact on affected parties. On the contrary, the United States Court of Appeals for the District of Columbia enunciated the accepted standards for determining retroactivity in Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380, 390 (D.C. Cir. 1972):

> Among the considerations that enter into a resolution of the problem [whether to apply an agency rule retroactively] are (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard. (Emphasis added).

This same concern is emphasized by the Seventh Circuit. Iowa Power & Light Company v. Burlington Northern, Inc., 647 F.2d 796, 812 (7th Cir. 1981) cert. denied sub nom. Burlington Northern, Inc. v. United States et al., 102 S. Ct. 1253 (1982) ("Retroactive application of policy is disfavored when . . . the hardship on affected parties will outweigh the public

ends to be accomplished."). Similarly, the Second Circuit has also subscribed to the standards announced by the District of Columbia Circuit. Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corporation, 534 F.2d 422, 452-53 (2d Cir. 1975), cert. denied, 97 S. Ct. 79 (1976) ("Whether retroactively to apply newly-adopted administrative rules is determined by balancing a variety of factors well summarized by Judge McGowan in Retail, Wholesale and Department Store Union v. N.L.R.B.. . . .").

TECA's abrupt and unjustified departure from these precedents creates a direct and irreconcilable conflict among the Courts of Appeals; amid this confusion, agencies are free to engage in retroactive rulemaking without an assessment of the

impact on the affected industry. A writ should issue so that this Court may resolve this conflict and definitively decide this issue.

2. TECA's Retroactive Application Of An Agency "Interpretative" Rule Without Consideration Of Its Impact Upon The Affected Industry Raises An Important Issue Of Federal Law Which Should Be Decided By This Court.

While TECA's decision that Ruling 1975-15 can be retroactively applied is based entirely upon consideration of facts unique to Pennzoil, the effects of this decision are by no means so limited. Indeed, the ramifications of TECA's decision extend beyond the parameters of the instant case to the entire domestic petroleum industry. The validity and retroactive application of Ruling 1975-15 are the fundamental issues in several pending cases involving members of the industry, including Cotton. See, e.g., Cotton Petroleum Corporation v. Edwards, No.

79-C-219-B (N.D. Okla., filed April 13, 1979); Christmann & Welborn v. DOE, No. 5-79-007 (N.D. Tex., filed Jan. 31, 1979); Mobley v. DOE, No. 78-1073 (W.D. Ca., filed Aug. 17, 1978); United States v. Exxon Corp., No. 78-1035 (D.D.C., filed June 8, 1978). TECA's decision preempts the common legal issue in these cases and also determines the fate of hundreds of millions of dollars at stake.

A decision with such wide-ranging consequences and significant impact upon a major industry deserves the review of this Court. The final decision about the retroactive application of Ruling 1975-15 to the industry should be made by this Court.

Conclusion

For the foregoing reasons, Cotton respectfully requests that this Court grant

certiorari in the instant case and reverse the Temporary Emergency Court of Appeals' decision upholding the validity and retroactive application of Ruling 1975-15.

Respectfully submitted,

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No. 81-2305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PENNZOIL COMPANY,

Petitioner,

v.

DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, Secretary of Energy, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

BRIEF *AMICUS CURIAE* OF EXXON CORPORATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

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PENNZOIL COMPANY,

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DEPARTMENT OF ENERGY, and JAMES B. EDWARDS, Secretary of Energy, and the UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The Temporary Emergency Court Of Appeals Of The United States

BRIEF *AMICUS CURIAE* OF EXXON CORPORATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Exxon Corporation ("Exxon"), with the consent of the parties, submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by Pennzoil Company ("Pennzoil").

INTEREST OF EXXON CORPORATION

Exxon is the defendant in an enforcement action brought by the United States on behalf of the Department of Energy ("DOE"). *United States* v. *Exxon Corp.*, No. 78-1035 (D.D.C., filed June 8, 1978). In that case, DOE alleges that Exxon violated the petroleum price regulations in its operation of the Hawkins Field Unit in

Wood County, Texas. The Hawkins Field Unit is one of the largest enhanced recovery projects ever undertaken in the United States to extract additional crude oil from a field in its declining phases of primary production. The amount in controversy is uncertain but substantial. The government's amended complaint alleges overcharges of $183,305,020,[1] but DOE has subsequently alleged that the amount in controversy may be much greater than that.[2]

Exxon has a direct interest in the outcome of the instant case because the ultimate legal issue presented in this case—the procedural validity of Ruling 1975-15 issued by the Federal Energy Administration ("FEA")—is also one of the issues presented in Exxon's case. Although resolution of that issue in favor of the agency here would not be determinative of the government's case against Exxon, resolution of that issue against the government would be determinative of Exxon's case in its favor. Exxon was an *amicus curiae* in the court of appeals below.

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[1] Amended Complaint at 16 (Sept. 18, 1978).

[2] In March, 1981, the DOE stated to the Temporary Emergency Court of Appeals that Exxon's potential alleged overcharge liability in the Hawkins Field case "now exceed[s] $500 million." Brief of the United States of America at 6 n.7 (Mar. 18, 1981), filed in *Exxon Corp.* v. *United States*, No. DC-85 (TECA). More recently, a senior DOE official told the press that the case was the DOE's "biggest dollar-value case" and involved "$800 million." The Houston Post, June 9, 1982, at 7E (remarks of Rayburn Hanzlik, Administrator, Economic Regulatory Administration).

STATEMENT

1. The concept of "property" was the cornerstone for federal price controls on crude oil from 1973 to 1981.[3] The regulatory character of crude oil, including the price at which it could lawfully be sold, was determined by reference to the "property" from which the crude oil was produced.[4] Because of the enormous disparity between controlled prices and "upper tier" or free market prices, disputes about the definition of "property," even as applied to a single producing field, could involve hundreds of millions of dollars.[5]

One of the most crucial issues involving the definition of "property" concerns its application to producing fields that were unitized after 1972, the regulatory base period. Unitization is the legal process whereby operating rights in a tract or area are combined to permit joint operation of the unitized area.[6] In some instances, an entire producing field is unitized for the purpose of increasing the amount of recoverable crude oil reserves. Such units are commonly called enhanced recovery units. The agency did not define "property," however, to include enhanced recovery units. "Property" was defined, with deceptive simplicity, as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 6 C.F.R. § 150.354(b), 38 Fed. Reg. 22536, 22538 (Aug. 22, 1973).

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[3] The price control program administered by the DOE and its predecessors began with Phase IV regulations of the Cost of Living Council, 38 Fed. Reg. 22536 (Aug. 22, 1973), and was terminated by President Reagan with Executive Order No. 12287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

[4] *See generally* 10 C.F.R. § 212.54 and § 212.71 *et seq.* (1981).

[5] *See* notes 1-2 *supra* and accompanying text.

[6] *See generally* 6 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 901 *et seq.* (1981).

This naturally gave rise to the view that when interest holders under separate leases entered into a unitization agreement, each lease remained a separate property within the contemplation of the regulations.

This view, moreover, appeared particularly compelling with regard to units that were formed after 1972 from lease or fee interests that existed separately during the 1972 base period. The regulatory character of crude oil was determined by comparing the current production of a property with its base production control level ("BPCL"), which generally was the amount of crude oil produced and sold from that property in 1972. *See id.* The need to compare a property's current production with its 1972 production strongly suggested that a post-1972 unitization would not work a change in the basic character of the property, *i.e.*, that a unit formed after 1972 would not constitute a new property but instead would encompass the several properties corresponding to its constituent lease and fee interests as they existed during the 1972 base period. Pennzoil followed this natural construction of the regulations in its determination of lawful prices for crude oil produced from the Walker Creek Field Unit in Arkansas, which was unitized in 1974. Pet. 5-7.

On August 29, 1975, however, without notice or opportunity for public comment, FEA departed from the natural construction of the "property" definition by issuing Ruling 1975-15, 40 Fed. Reg. 40832 (Sept. 4, 1975). Ruling 1975-15 took the position, with regard to post-1972 unitizations, that the unit, not its leases, should be treated as the relevant "property" for the purpose of measuring current production, and that a new BPCL should be constructed for the unit, by aggregating the separate BPCL's of its leases, as if the unit had been in existence in 1972. FEA later amended and partially res-

cinded *ab initio* Ruling 1975-15 to provide that a post-1972 enhanced recovery unit becomes a property only when enhanced recovery operations lead to a "significant alteration of producing patterns." 41 Fed. Reg. 4931, 4937 (Feb. 3, 1976).[7] But Ruling 1975-15, even as amended, was seriously adverse to Pennzoil, for it purported to subject to lower tier price treatment very substantial quantities of crude oil that otherwise would have qualified for higher prices or would have been exempt from price controls altogether. *Compare* 10 C.F.R. § 212.73, 39 Fed. Reg. 1924, 1952 (Jan. 15, 1974), *with* 10 C.F.R. § 212.74, 39 Fed. Reg. 1924, 1952 (Jan. 15, 1974).

2. Pennzoil instituted this action requesting that Ruling 1975-15 be declared invalid because it was adopted in violation of the rulemaking requirements of the Administrative Procedure Act ("APA")[8] and the Federal Energy Administration Act of 1974 ("FEA Act").[9] The parties took substantial discovery directed to the question whether Ruling 1975-15 was intepretative in character, so as to bring it within the scope of the APA's exemption for "interpretative rules,"[10] or whether it was a legislative rule that reflected a substantive policy choice made

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[7] The agency did not define "significant alteration in producing patterns" until August, 1976, 10 C.F.R. § 212.75(b), 41 Fed. Reg. 36172, 36184 (Aug. 26, 1976), and it continued to "explain" and "clarify" its regulatory "interpretations" for some time thereafter. *See* Ruling 1977-1, 42 Fed. Reg. 3628 (Jan. 19, 1977); Ruling 1977-2, 42 Fed. Reg. 4409 (Jan. 25, 1977).

[8] 5 U.S.C. § 553(b) & (c). FEA was subject to the rulemaking requirements of the APA at the time it published Ruling 1975-15. *See* Federal Energy Administration Act, § 7(i)(1)(A), 15 U.S.C. § 766(i)(1)(A).

[9] FEA Act § 7(c) & (i), 15 U.S.C. § 766(c) & (i).

[10] APA § 4(a), 5 U.S.C. § 553(b)(A).

by the agency without the benefit of a notice-and-comment rulemaking. Pennzoil then requested a trial, but the government moved for summary judgment. Pet. 10. DOE argued that the validity of Ruling 1975-15 already had been sustained in *Grigsby* v. *DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979), and that, as a factual matter, the Ruling was a reasonable and historically correct interpretation of the regulation. With regard to the second point, DOE asserted that "Ruling 1975-15 merely reiterates an interpretation which the FEA had already followed consistently over a long period of time . . . ."[11] DOE rested this factual assertion upon five interpretations issued by FEA's General Counsel to private parties between December 2, 1974, and June 30, 1975.[12]

Pennzoil responded in two ways to the agency's contention that Ruling 1975-15 was a valid and historically correct interpretation. First, Pennzoil pointed out that none of the five interpretations relied upon by DOE had been published in the Federal Register or indexed and made publicly available, as required by the APA, until May 1977—almost two years after the publication of Ruling 1975-15.[13] Because Pennzoil did not have "actual and

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[11] Brief in Support of Defendants' Motion for Summary Judgment, *Pennzoil Co.* v. *DOE*, No. 78-335 (D. Del.), at 53 (Jan. 23, 1981), II R. 272. Citations are to the volume and page number of the nine volume stipulated record filed in the court of appeals.

[12] *See* II R. 272-74 *citing* FEA Interpretation 1974-22, 42 Fed. Reg. 25659 (May 18, 1977); FEA Interpretation 1975-2, 42 Fed. Reg. 23723 (May 10, 1977); FEA Interpretation 1975-4, 42 Fed. Reg. 23726 (May 10, 1977); FEA Interpretation 1975-10, 42 Fed. Reg. 23730 (May 10, 1977); and FEA Interpretation 1975-27, 42 Fed. Reg. 23740 (May 10, 1977).

[13] The APA requires an agency to publish in the Federal Register "statements of general policy or interpretations of general applicability formulated and adopted by the agency . . . ." 5

timely notice" of those interpretations, the agency was statutorily proscribed from citing them as precedent or otherwise using them against Pennzoil.[14] Pennzoil also pointed out that only one of those five interpretations applied to a post-1972 multiple-lease, enhanced recovery unit, such as the Walker Creek Field Unit, and that interpretation simply held that such a unit was not a new property with a zero BPCL.

Second, Pennzoil produced a substantial record of documentary and testimonial evidence—including 151 contemporaneous documents,[15] four sworn affidavits of former key agency officials,[16] and eight sworn affidavits

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U.S.C.§ 552(a)(1)(D). It further requires an agency to "make available for public inspection and copying . . . those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register . . . ." *Id.* § 552(a)(2)(B).

[14] With respect to "interpretations of general applicability," the APA was amended in 1967 to provide that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C.§ 552(a)(1). Similarly, other agency statements of policy or interpretations "that affect[] a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—(i) it has been indexed and either made available or published as provided by this paragraph; or (ii) the party has actual and timely notice of the terms thereof." *Id.* § 552(a)(2). *See generally Morton* v. *Ruiz*, 415 U.S. 199, 232-36 (1974).

[15] Volumes VI, VII and VIII of the Record contain those documents.

[16] V R. 1324 *et seq.*, 1389 *et seq.*, 1442 *et seq.* & 1549 *et seq.* The DOE moved to strike these affidavits, even though it had offered and relied upon the affidavits and testimony of two of these same witnesses in other cases to explain the intent and administrative history of its regulations. The district court never granted that motion.

of industry officials and their counsel who had contemporaneous communications with the agency concerning the regulatory issues in question [17]—which contradicted the factual basis for DOE's summary judgment motion. This evidence showed that prior to the issuance of Ruling 1975-15 the agency, both in internal deliberations and in communications with members of the industry, had construed the term "property" to refer to the separate lease or fee interests included in post-1972 units and not to the units themselves—a position diametrically opposed to the position espoused in Ruling 1975-15.

Pennzoil submitted that this evidence precluded summary judgment in favor of the government on the questions of the validity and historical correctness of Ruling 1975-15: if Pennzoil's view of the evidence was correct, then Ruling 1975-15 represented a dramatic change, not a codification, of the agency's long-standing regulatory position, from which it would follow that Ruling 1975-15 was legislative, not interpretative, in character, and therefore was invalid due to the agency's failure to provide notice and opportunity for public comment as required by the APA and the FEA Act. [18]

The district court did not address the question of the reasonableness and historical correctness of Ruling 1975-15. The court granted summary judgment to DOE solely on the ground that the validity of Ruling 1975-15 had been sustained in *Grigsby*. Accordingly, the district court had

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[17] V R. 1359 *et seq.*, 1362 *et seq.*, 1366 *et seq.*, 1370 *et seq.*, 1416 *et seq.*, 1526 *et seq.*, 1532 *et seq.*, & 1618 *et seq.*

[18] Section 4 of the APA generally requires agencies to publish notice of proposed rules and to provide "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(b)(3) and (c).

no occasion to evaluate the record submitted by Pennzoil. It did not adjudicate or find any facts concerning any of the contested factual issues in the case. And it did not express an opinion, even in *dictum*, as to what its evidentiary analysis and conclusions would have been, had it believed that it was entitled to address those issues.

3. On Pennzoil's appeal from the entry of summary judgment, the Temporary Emergency Court of Appeals ("TECA") essentially undertook to sit as a three-judge trial court and to adjudicate disputed and previously unaddressed factual issues. Unlike the district court, TECA did not view the case as one simply controlled by prior precedent. Instead, TECA plunged into the voluminous record and did so without the benefit of any decision by the district court on the numerous factual issues presented by that record. TECA sifted, analyzed and weighed the probative value of evidence in the record, as well as the unsupported statements of DOE counsel in their briefs, to which TECA uncritically attributed evidentiary significance. [19] On the basis of its own findings of fact, TECA concluded that Ruling 1975-15 was "sustainable as a reasonable interpretation." Pet. App. 48a.

SUMMARY OF ARGUMENT

The court of appeals in this case, by adjudicating factual issues not addressed by the district court and by resolving those issues against the party opposing summary judgment, proceeded in a manner proscribed by decisions of this Court. *See, e.g., Kennedy* v. *Silas Mason*

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[19] This Court has previously cautioned that "[t]he courts may not accept . . . counsel's post hoc rationalizations for agency action . . . ." *Burlington Truck-Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962).

Co., 334 U.S. 249, 256 (1948); *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962). In thus deciding the case, the court "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a) of the Rules of this Court.

The underlying issue in this case is one of immense economic significance to crude oil producers. The government's own allegations indicate that the effect upon the industry may exceed one billion dollars.

ARGUMENT

1. In this case, TECA turned the traditional relationship between trial and appellate courts on its head. TECA ignored the fundamental distinction that exists in the federal judicial system between trial courts—whose essential role is to evaluate evidence and make findings of fact—and courts of appeals—whose role is to decide questions of law. *See Pullman-Standard* v. *Swint*, 50 U.S.L.W. 4425, 4429 (U.S. April 27, 1982). TECA usurped the function of the district court here by adjudicating factual issues that the district court did not address, and it did so by resolving against one party vigorously disputed issues of material fact in the context of the other party's motion for summary judgment.

It would have been reversible error for the district court to have done what TECA did in this case. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the record] must be viewed in the light most favorable to the party opposing the motion"). *Accord, Adickes* v. *S.H. Kress Co.*, 398 U.S. 144, 157 (1970); *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 473 (1962). For an appellate court to resolve disputed issues of material fact in favor of the

moving party, in a case arising on summary judgment, represents a fundamental departure from the accepted norm laid down by this Court for the hearing of appeals. *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256 (1948) ("The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine"). As this Court recently affirmed, a court of appeals' "own review of the evidence" is reversible error because "[d]etermining the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 50 U.S.L.W. 4592, 4596 (U.S. June 1, 1982).[20]

This case provides a dramatic example of why a court of appeals must not stray outside its legitimate domain. Pennzoil, in opposing the government's motion for summary judgment, was entitled to have the record "viewed in the light most favorable to [it] . . . ." *Adickes* v. *S.H. Kress Co.*, 398 U.S. at 157. That record, in fact, was overwhelmingly favorable to Pennzoil and adverse to DOE. The record showed, for example, that when the Cost of Living Council ("CLC") first promulgated the regulatory definition of "property," it intentionally adopted an "individual lease or property" approach,[21]

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[20] *See also Pullman-Standard* v. *Swint*, 50 U.S.L.W. 4425,4430 (U.S. April 27, 1982) ("the [appellate] court's independent consideration of the totality of the circumstances it found in the record," rather than a remand to the district court for appropriate fact findings, was reversible error).

[21] VI R. 1637.

with the explicit understanding, as stated by CLC's own Energy Policy Committee, that "[a] lease-by-lease approach in a unitized field should operate in the same manner as in other cases . . . ."[22] Officials within CLC understood that leases that produced crude oil in 1972 "should continue to be treated as separate properties although they were included in a unit formed after 1972."[23] In the words of William N. Walker, CLC's General Counsel and Deputy Director, "[i]t was not the purpose and intent of the CLC's regulations to *require* that an enhanced recovery or secondary recovery unit formed after 1972 be treated as a single property."[24] CLC evidently had these considerations in mind when it promulgated the parallel regulatory definition of "property" implementing the statutory exemption for so-called "stripper" (low production) wells:

> *Property is the right which arises from a lease in existence in 1972* or from a fee interest to produce domestic crude petroleum in existence in 1972 *and is co-extensive with that property used* in § 150.354(b) [predecessor of 10 C.F.R. § 212.72] *for purposes of determining "base production control level."*

6 C.F.R. § 150.54(s)(2), 38 Fed. Reg. 32495 (Nov. 26, 1973) (emphasis added).

The record further shows that, with this history in mind, lawyers in the Office of the General Counsel of CLC's successors, the Federal Energy Office ("FEO") and FEA, contemporaneously believed that "each of the leases within a unit could constitute a separate 'property' if the producing interest existed in that manner during

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[22] VI R. 1638.

[23] V R. 1434.

[24] V R. 1564 (emphasis in original).

1972."[25] The Internal Revenue Service, which at the time was charged with the duty of audit and enforcement, advised that "the calculation of new crude petroleum production would be determined on a lease-by-lease basis in a unitized field."[26] Responsible agency officials made similar representations to crude oil producers throughout 1974. For example, the head of FEO's Office of Price Exception advised Austral Oil Company that "it would not be a violation of the regulations to construe that term ["property"] to mean each individual lease in a unit."[27]

This view of the definition of "property," moreover, was adopted and applied by FEA in formal administrative adjudications as late as four days *after* the agency's issuance of Ruling 1975-15, which announced a diametrically opposite view. In *Empire Drilling Co.*, 2 FEA ¶ 83,142, *aff'd*, 2 FEA ¶ 80,676 (1975), a producer had requested permission to use a unit-wide BPCL for a post-1972 unit, *i.e.*, to do precisely what Ruling 1975-15 declared to have been required all along. *FEA denied the request! See also Sun Oil Co.*, 2 FEA ¶ 83,075 (1975) (denying a similar request).

The record thus demonstrates that Ruling 1975-15 was in no sense a mere codification of pre-existing regulatory requirements. In issuing that Ruling, FEA was breaking new ground and imposing new and different requirements, albeit without the benefit of the educational proc-

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[25] VII R. 2131. *See also* VII R. 2045.

[26] VII R. 2021. *See also* VII R. 2019; V R. 1370-71; VII R. 2023; V R. 1527.

[27] V R. 1392-93; V R. 1368. *See also* V R. 1417-18 & 1619; VII R. 1999, 2007, 2016-17, 2018, 2046, 2047-48, 2123, 2144, 2147, 2156, 2150 & 2151; VIII R. 2234 (public communications and internal documents in 1973-74).

ess that a notice-and-comment rulemaking would have provided. The agency itself recognized the true nature of Ruling 1975-15 when it first proposed reconsideration of the Ruling, 41 Fed. Reg. 1564, 1569 (Jan. 8, 1976), and then, after receiving public input, amended the Ruling *ab initio*, stating,

> until such time as there has been a significant change in producing patterns, *there is no reason for the unit operator to depart from the historical practice of determining quantities of new crude oil on a lease-by-lease basis.*

41 Fed. Reg. 4931, 4937 (Feb. 3, 1976). Because the concept of "significant change in producing patterns" by no stretch of the imagination had been included within the original regulatory definition of "property," it is clear that FEA was engaged in substantive amendment, not mere interpretation. And as a substantive amendment to the regulations, Ruling 1975-15 plainly was procedurally invalid due to the agency's failure to provide notice and opportunity for public comment.

The fundamental injustice of the decision in this case is illustrated by contrasting TECA's conclusion about the clarity of the "property" regulation with the agency's own pre-litigation statements to a congressional oversight committee. According to two of the three judges on the TECA panel, "the property concept" that was said to be "[i]nherent in that regulation" furnished "a meaningful guide for applying the definition to [Pennzoil's] unit in question . . . ." Pet. App. 26a. The TECA majority further stated that,

> [f]ar from there being institutional uncertainty and conflict, there existed in official rulings[28] almost a

[28] This refers to the five unpublished FEA interpretations, none of which was on point and none of which could lawfully be cited or used

> bright line of agency explanation, tentative only on collateral issues but relatively clear and steadfast upon the particular principle in this case.

Pet. App. 36a. In contrast with these statements stands the agency's congressional testimony in November 1976 concerning the very same regulations:

> the ["property"] definition . . . was a very short definition and it was not articulated or explained in greater detail except to have explained that it was the basic building block for the incentive system . . . .[29]
>
> [T]here was a substantial difficulty in applying [the "property" definition] to thousands and thousands of very unique situations. *It was not clear [until September 1, 1976] exactly what the regulation meant; it was not even clear to the regulatory agency itself.*[30]

TECA's conclusion that the agency's non-public explications of its "property" regulation were "clear and steadfast," even though the agency had represented otherwise to Congress, endorses the agency's litigation position to a greater degree than the agency had argued it. Such an anomaly demonstrates the wisdom of Mr.

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against a person such as Pennzoil who did not have "actual and timely notice" of such unpublished materials. *See* notes 12-14 *supra* and accompanying text.

[29] *Hearing on Crude Oil Pricing Compliance Problems Before the Subcomm. on Energy & Power of the House Comm. on Interstate & Foreign Commerce*, 94th Cong., 2d Sess. at 102 (Nov. 11, 1976) (remarks of David G. Wilson, Deputy General Counsel, Federal Energy Administration.)

[30] *Id.* at 103 (remarks of John A. Hill, Deputy Administrator, Federal Energy Administration) (emphasis added).

Justice Jackson's advice to appellate courts that are confronted with complex records such as the one in this case:

> While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.[31]

2. The question of the validity of Ruling 1975-15 ultimately at issue in this case is one of immense economic significance to crude oil producers. The construction of the regulatory concept of "property" is extremely important to the outcome of numerous pending cases,[32] and the potential impact of the decision below upon the industry may exceed one billion dollars. This Court should grant review to ensure that liability of this magnitude is not heedlessly thrust upon the industry by the decision below.

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[31] *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 257 (1948).

[32] In addition to its own case, Exxon is aware of at least three other federal court cases in which "unitized property" issues are critical: *Cotton Petroleum Corp.* v. *DOE*, No. 79-C-217-D (N.D. Okla., filed April 13, 1979); *Christmann & Welborn* v. *DOE*, No. 5-79-007 (N.D. Tex., filed Jan. 31, 1979); *Mobley* v. *DOE*, No. 78-1073 (W.D. La., filed Aug. 17, 1978). There are undoubtedly numerous other "unitized property" cases in administrative litigation or under current investigation by DOE.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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